IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

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CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, HOLLAND-AMERICA INSURANCE COMPANY TRUST AND MISSION REINSURANCE CORPORATION TRUST,

*Petitioner,*

v.

ALLSTATE INSURANCE COMPANY,

*Respondent.*

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the court below erred in holding that a remand order based on abstention is reviewable by appeal under the collateral order doctrine developed in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

2. Whether the court below erred in holding that the abstention powers of federal courts are limited to actions in equity, or, alternatively, whether that court erred in limiting the exercise of *Burford* abstention solely to actions in equity.

## PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The Appellee in the Ninth Circuit, who is the Petitioner here, is Chuck Quackenbush, the Insurance Commissioner of the State of California (statutory successor to John Garamendi) in his capacity as Liquidator and Trustee of the Mission Insurance Company Trust, Mission National Insurance Company Trust, Enterprise Insurance Company Trust, Holland-America Insurance Company Trust, and Mission Reinsurance Corporation Trust.[1] The Appellant in the Ninth Circuit, and Respondent here, is Allstate Insurance Company.

[1] Prior to receivership, the parent of Mission Insurance Company was Mission Insurance Group, Inc. ("MIG"). MIG emerged from Chapter 11 bankruptcy as Danielson Holding Corporation.

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No. 95 - ——

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The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 47 F.3d 350. The unpublished order of the district court granting abstention under the *Burford* doc-

trine is reproduced in Appendix B. The unpublished order of the court of appeals denying the petition for rehearing is reproduced in Appendix C.

## JURISDICTION

The opinion of the court of appeals was entered on February 2, 1995. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on May 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The statutes involved are the pertinent provisions of the McCarran-Ferguson Act, codified at 15 U.S.C. §§ 1011-1015, the pertinent provisions of the California Insurance Code, codified at Cal. Ins. Code §§ 900-900.2, 900.9, 903-903.5, 905-911, 922.1-923.5, 925, 925.2, 925.4, 1010-1042, 1056.5-1064.12, and the pertinent provisions of the Judiciary Act, codified at 28 U.S.C. §§ 1332(a), 1441(a), (c). These are reproduced in Appendix D.

## STATEMENT OF THE CASE

1. The present case arose out of the on-going liquidation proceedings relating to the Mission Insurance Companies [2] which were placed into California state court conservation proceedings on October 31 and November 26, 1985, and into liquidation proceedings on February 24, 1987.[3] This was the largest insurance insolvency in U.S. history up to that time and involves policyholders in all 50 states.[4] As will be discussed in more detail below

[2] Mission Insurance Company ("MIC"), Mission National Insurance Company, Enterprise Insurance Company, Holland-America Insurance Company and Mission Reinsurance Corporation.

[3] See *infra*, n.7 & 8.

[4] MIG, the parent of MIC, and several non-insurance affiliates were placed into federal bankruptcy proceedings. By the wise exercise of their respective jurisdictions, the bankruptcy court and the state receivership court have completely avoided any jurisdictional conflict.



at 20-22, 26-28, this case involves unique and important issues of judicial federalism.

2. California, like all states, has enacted a comprehensive statutory scheme for the administration of insurance insolvency matters. Cal. Ins. Code §§ 1010-1064.12. Upon an insolvency, title to all assets of the insolvent, including all accounts receivable, is vested in the California Insurance Commissioner (the "Commissioner")[5] by operation of law. Cal. Ins. Code §§ 1011, 1064.2(b). The California statutes require that the Commissioner be appointed conservator or liquidator of insolvent insurers, Cal. Ins. Code §§ 1011, 1016, and in that capacity, the Commissioner acts as receiver and trustee. Cal. Ins. Code § 1057; *Anderson v. Great Republic Life Ins. Co.*, 41 Cal. App.2d 181, 188, 106 P.2d 75, 79 (1940). In this role the Commissioner is not simply a common law receiver, but acts in his official capacity as an officer of the state, and is the embodiment of the state's police power in the insurance insolvency context. Cal. Ins. Code §§ 1011, 1059; see, e.g., *20th Century Ins. Co. v. Garamendi*, 8 Cal.4th 216, 240, 878 P.2d 566, 580, 32 Cal. Rptr.2d 807, 821 (1994), *cert. denied*, 115 S. Ct. 1106 (1995); *Carpenter v. Pacific Mutual Life Ins. Co.*, 10 Cal.2d 307, 329, 74 P.2d 761, 774-775 (1937), *aff'd sub nom. Neblett v. Carpenter*, 305 U.S. 297 (1938).

The instant litigation is only one aspect of, but intimately interwoven with, the overall state court liquidation proceedings which are under the control of the Receiver-

[5] There have been four Commissioners in charge of these proceedings: Commissioner Bruce Bunner, Commissioner Roxani Gillespie, Commissioner John Garamendi, and Commissioner Chuck Quackenbush. Unless there is a reason to do so, this brief will not distinguish between the successive Commissioners and will simply refer to the "Commissioner."

ship Court.[6] On the one hand, the Commissioner must receive and determine the many thousands of claims (including those of Respondent, Allstate Insurance Company ("Allstate")) which have been filed with the Commissioner pursuant to state statutes. Cal. Ins. Code §§ 1021, 1032, 1037(c). On the other hand, the Commissioner must protect, marshal and eventually liquidate the assets of the Mission Companies, title to which is vested in him in his official capacity. See *Carpenter*, 10 Cal.2d at 329, 74 P.2d at 774-775; Cal. Ins. Code § 1011.

3. When the Mission Companies were placed into conservation, the Receivership Court issued orders which both enjoined all persons "from instituting or maintaining any action at law or suit in equity including but not limited to matters in arbitration, against [Mission] or against said Conservator . . . except after an order from this court obtained after reasonable notice to the Conservator" and assumed custody of all assets of the Mission Companies.[7] Upon liquidation, the Receivership Court again issued orders containing similar injunctions and affirming that court's continuing assertion of jurisdiction over all assets and properties of the Mission Companies, "this court . . . hereby asserts and assumes sole and exclusive juridiction over same to the exclusion of all others and further continues to assert and assume sole and exclusive jurisdiction to administer the said assets and property of the [Mission Companies] through the Liquidator, and to determine the validity or invalidity of any and all claims to or affecting such assets."[8] This Court has held that valid, subsisting

[6] All references to the "Receivership Court" herein shall mean the Superior Court of the State of California, County of Los Angeles.

[7] Order Appointing Conservator, October 31, 1985. (App. 116a-118a). The Order included in the Appendix relates to MIC, however, identical Orders were issued on each of the other Mission Companies on November 26, 1985.

[8] Supplemental Order Regarding Order Appointing Liquidator, March 5, 1987. (App. 122a-126a). The Order Appointing Liquidator dated February 24, 1987, contained in Appendix E, at 119a-121a, relates to MIC, however, identical Liquidation Orders were issued on each of the other Mission Companies on February 24, 1987. The Conservation Orders, Liquidation Orders and the Supplemental Order are all final and have not been challenged at any level. Allstate may not now complain about provisions of orders of which it had notice and failed to seek review. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Acc. & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 703-710 (1982) [hereinafter *UNAC*]; see *Allstate Insurance Co. v. Hughes*, 174 B.R. 884, 887-888 (S.D.N.Y. 1994).



and binding orders of a receivership court are entitled to full faith and credit and comity.[9]

4. As a receiver, the Commissioner must gain control over the process if his statutory mandate is to be carried out. The laws of California vest wide powers in the Commissioner for the purpose of enabling the Commissioner to perform the duties required by statute. See, e.g., Cal. Ins. Code § 1037; *Garris v. Carpenter*, 33 Cal. App. 2d 649, 92 P.2d 688, 692 (1939). Unless the insolvency and all of its claims functions proceed in a single forum it is impossible for the Commissioner to gain such control.

The instant case is an excellent example of this problem. Prior to their receivership, the Mission Companies issued insurance policies to hundreds of thousands of policyholders in all 50 states. These policies represent many billions of dollars in both property and casualty insurance liabilities. For example, policyholder claims include those for workers compensation as well as claims for asbestosis, agent orange, toxic shock syndrome, breast implants, and environmental clean-up matters.

In addition to issuing insurance policies directly to the public, the Mission Companies entered into hundreds of reinsurance transactions with reinsurers from all over the world.[10] By some of these arrangements, various of the

[9] *UNAC*, 455 U.S. 691.

[10] Those reinsurers were from countries such as Argentina, Belgium, Bermuda, Brazil, China, Denmark, Egypt, England, Finland,

Mission Companies "ceded" reinsurance to various reinsurers who agreed to accept substantial portions of the risk from the original insurance policies. These reinsurers received hundreds of millions of dollars in premium money for the assumption of this risk. Under still other arrangements, various reinsurers ceded business to one or more of the Mission Companies. As a further complication, many of the reinsurers who assumed reinsurance from one or more of the Mission Companies also purchased additional reinsurance (e.g., stop loss and catastrophe covers) from a variety of other reinsurers. These transactions created massive insurance and reinsurance webs upon which ultimately depended the financial efficacy of the original insurance policies and the solvency of the Mission Companies.[11]

5. By the time the Commissioner was forced to place the Mission Companies into state court receivership proceedings, many reinsurers had ceased making payments upon the sums due from them (the "reinsurance recoverables"). Indeed, the primary reason for the insolvency was the failure of the reinsurers to pay the reinsurance recoverables. Disputes then arose between the Commissioner and the reinsurers regarding the interpretation of California law and its application to these reinsurance arrangements in the insolvency context. See, e.g., *Prudential Reinsurance Co. v. Superior Court (Garamendi)*, 3 Cal.4th 1118, 842 P.2d 48, 14 Cal. Rptr.2d 749 (1992) [hereinafter *Prudential*].[12]

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France, Germany, India, Ireland, Israel, Italy, Japan, Korea, Kuwait, Monte Carlo, the Netherlands, New Zealand, Norway, Singapore, Spain, Sweden, Switzerland, the United States, and Venezuela, among others.

[11] Reinsurance recoverables are treated as credits or assets on the insurers' financial statements. There are statutory provisions which govern reinsurance recoverables. Cal. Ins. Code §§ 900-900.2, 900.9, 903-903.5, 905-911, 922.1-923.5, 925, 925.2, 925.4.

[12] Further, a March 8, 1994 Receivership Court decision regarding reinsurance set-off rights and the proper interpretation of the *Prudential* decision is now pending before the California Courts of Appeal in *Imperial Casualty and Indemnity Co. v. Insurance Commissioner of the State of California*, Case No. B083725 [hereinafter *ICIC*].



After liquidation of the Mission Companies was commenced pursuant to state statute and the related orders issued by the Receivership Court, over 180,000 claims were filed in the receivership proceedings by policyholders, third party claimants, and state guaranty associations, as well as general creditors. Allstate and other reinsurers were among these claimants.[13]

The Commissioner took various actions to sort all of this out. The Commissioner sought to marshal assets, analyze claims, determine claims priorities among claimants and generally to administer the proceedings pursuant to the statutory scheme. Cal. Ins. Code §§ 1023-1033, 1037(c). As to the reinsurance web, the Commissioner made public policy decisions and administrative determinations as to how the various impacted statutes would be interpreted by him, as the public official responsible for interpreting the statutes. See *Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 824, 771 P.2d 1247, 1258, 258 Cal. Rptr. 161, 172 (1989) (Commissioner "has broad discretion to adopt rules and regulations to promote the public welfare"); *Ralphs Grocery Co. v. Reimel*, 69 Cal.2d 172, 177, 444 P.2d 79, 83, 70 Cal. Rptr. 407, 411 (1968) ("[T]he construction of a statute by the officials charged with its administration must be given great weight"). Ultimately, the Commissioner sued several hundred reinsurers in the proceedings pending before the Receivership Court seeking a declaratory judgment, an interpretation of the parties' contracts, money judgments

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[13] Allstate's claim filed in the receivership proceedings asserts the same issues it now seeks to assert in the district court. Allstate entered into approximately 15 treaties and numerous facultative certificates with one or more of the Mission Companies and was, in turn, reinsured by MIC under 14 treaties. Allstate filed several claims in the receivership proceedings in 1987.

and other relief as deemed appropriate by the Receivership Court. To date, the Commissioner has recovered approximately $1.2 Billion from reinsurers. While most of this recovery resulted from settlement agreements, the vast majority of those settlements were consummated only after complex litigation, all of which occurred under the auspices of the Receivership Court.[14] The litigation involves the interpretation of the various interlocking and related reinsurance arrangements and the application of California statutory and case law to them. The arrangements in issue are exceedingly complex and the rights and obligations of the Mission Companies and the reinsurers under these contracts are controlled by California law, and particularly by various provisions of the California Insurance Code. See, e.g., §§ 922.2-922.8, 1010-1037, 1064.2-1064.8.

The litigation that has occurred in the state Receivership Court has resulted in decisions by the California Courts of Appeal and the California Supreme Court.[15] In *Prudential*, the California Supreme Court rendered a 4-3 opinion involving the highly disputed and complex issue of when, under California statutory law, a reinsurer may set off claims against the insolvent from the reinsurance recoverables. The determination was that certain offsets ("group-to-group") are not permitted, but that others ("company-to-company") are permissible. Part of the instant litigation involves the correct application and interpretation of the *Prudential* decision. There are unsettled difficult issues of state law as to the precise definition of "group-to-group" offset claims and "company-to-

[14] *Insurance Commissioner v. Abeille Paix(L')*, *et al.*, Los Angeles Superior Court (LASC) No. C629709; *Insurance Commissioner v. Abeille Paix Reassurances, et al.*, LASC No. C683233; *Insurance Commissioner v. AIB Syndicate, Inc., et al.*, LASC No. BC065715; and *Insurance Commissioner v. Top International*, LASC No. BC066464.

[15] *Prudential*; *Garamendi v. Mission Ins. Co.*, 15 Cal. App.4th 1277, 19 Cal. Rptr.2d 190, *rev. denied* (1993); *ICIC* (pending).



company" offset claims. Having dealt with them on a number of occasions, the Receivership Court is extremely familiar with these issues. If an appellate determination of these issues becomes necessary, it should occur in the California state courts because it involves the interpretation of unsettled issues arising from state statutes and opinions of the California Supreme Court.

6. The basic litigation between the Commissioner and the reinsurers began in December 1986, when the Commissioner filed suit against approximately 144 reinsurers.[16] That case (referred to as "Gillespie I") was consolidated with the liquidation proceedings and has been continuously presided over by the Honorable Kurt J. Lewin of the Receivership Court after a brief period during which the case was before the Honorable Ricardo Torres. The instant complaint was filed in June 1990 and alleges causes of action identical to those in Gillespie I. On August 30, 1990, Allstate removed this action to the federal district court based on diversity grounds under 28 U.S.C. §§ 1332(a)(2), 1441(c).[17]

7. After removal, the Commissioner moved to remand under the *Younger*,[18] *Colorado River*[19] and *Burford*[20] abstention doctrines. The district court granted the motion to abstain based upon *Burford* and the numerous cases applying the *Burford* doctrine in similar situations involving insolvent insurers. In its order granting abstention, the district court reasoned that by exercising jurisdiction over this action, it would be required to determine an

[16] *Insurance Commissioner v. Abeille Paix(L')*, *et al.*, LASC No. C629709. The number of defendants later grew to approximately 300.

[17] Complete diversity was created when settlements resulted in all non-diverse defendants being dropped from the suit.

[18] *Younger v. Harris*, 401 U.S. 37 (1971).

[19] *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

[20] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

important matter of state law and interfere with the California statutory scheme for the regulation of insolvent insurance companies. The district court noted that this case involved the "critical" claims question of whether a reinsurer is entitled to set off amounts allegedly owed to the Mission Companies under the provisions of the state statutes (Cal. Ins. Code § 1031) (App., 71a). After a thorough review of the cases applying the *Burford* doctrine, the district court concluded that:

> California has an overriding interest in regulating insurance insolvencies and liquidations in a uniform and orderly manner. If the Court were to adjudicate the Commissioner's reinsurance dispute with Allstate, and specifically the hotly contested set-off issue, then this important state interest could be undermined by inconsistent rulings from the federal and state courts.

(App., 34a). Accordingly, the district court ordered the remand of this case to the Receivership Court.

8. On appeal to the Ninth Circuit, Allstate pressed its position that the circumstances of this controversy remove it from the considerable authority that abstention is warranted in cases of insurance insolvency.[21] The Commissioner argued that the remand order was not review-

[21] See, e.g., *Penn General Casualty Co. v. Commonwealth of Pennsylvania*, 294 U.S. 189 (1935); *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31 (2nd Cir. 1988); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 43-44 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987); *Levy v. Lewis*, 635 F.2d 960, 963-964 (2nd Cir. 1980); *Lac D'Amiante du Quebec, Ltee v. American Home Assur. Co.*, 864 F.2d 1033 (3rd Cir. 1988); *Charleston Area Med. Ctr. v. Blue Cross and Blue Shield Mut. of Ohio, Inc.*, 6 F.3d 243, 250 n.5 (4th Cir. 1993); *Barnhardt Marine Ins., Inc., v. New Eng. Int'l Sur. of Am., Inc.*, 961 F.2d 529, 531-32 (5th Cir. 1992); *Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249, 254-55 (5th Cir. 1990); *Property Cas. Ins. v. Central Nat. Ins. Co. of Omaha*, 936 F.2d 319 (7th Cir. 1991); *Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419 (7th Cir. 1990); *Blackhawk Heating & Plumbing Co., Inc. v. Geeslin*, 530 F.2d 154 (7th Cir. 1976); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 707 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989).



able either under 28 U.S.C. § 1447(d) or as a final collateral order and further argued that this matter presents a classic case for abstention.

9. In a narrowly focused opinion, the court of appeals reversed the district court and held that review of the remand order is not barred by 28 U.S.C. § 1447(d); that the remand order based on abstention was a final collateral order that was reviewable on appeal; and that under *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) [hereinafter *NOPSI*], a district court has no power to exercise any discretion to abstain under *Burford* where the suit involves a purely legal action, as opposed to an action in equity. The Ninth Circuit wrote:

> The Supreme Court's recent, restrictive reading of *Burford*, together with its reaffirmation of the doctrine's equitable predicate, leads us to conclude that a district court may not abstain under *Burford* when the plaintiff seeks only legal relief.

(App., 12a).

10. On February 16, 1995, the Commissioner filed a petition for rehearing and suggestion for rehearing *en banc* because, *inter alia*, the Ninth Circuit overlooked the fact that the underlying action involves a suit for declaratory relief, which under California law sounds in equity; and that Allstate's set-off claim is an equitable remedy sought under sanction of a state statute; and that the specialized state-court liquidation proceedings are essentially equitable in nature. On May 19, 1995, the Ninth Circuit denied rehearing.

## REASONS FOR GRANTING THE WRIT

### I. INTRODUCTION.

This case merits the attention of this Court because it involves matters of vital and national public concern. First, it involves important issues as to when a district court's order is immediately appealable, thereby raising questions of finality, and of frustration of the administration of justice by delay and by misuse of appellate resources. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 350 (1976); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); see *Johnson v. Jones*, 515 U.S. ——, 115 S. Ct. 2151 (1995). Next, it serves to confuse and undermine abstention doctrines, particularly *Burford* abstention, and undermines judicial federalism in general by impeding the power of the states in an important state enclave. Significantly, as discussed further below, the court of appeals' opinion conflicts with opinions of this Court and with opinions of other courts of appeals. This Court has long recognized the extreme importance of preserving the dual system of government and protecting the prerogatives of the states. Both this Court and Congress have recognized the paramount interest of the states in regulating the business of insurance, including the regulation of insurance insolvency proceedings.[22] Indeed, it is at the time of a massive insurance failure, such as the one involved here, that the policyholders are most in jeopardy. The entire insurance regulatory system fails if it cannot, at such a moment of crisis, deliver upon the fundamental promises made to the policyholders.

This Court has fostered doctrines of federalism by protecting state authority against federal intrusion in certain

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[22] *United States Department of Treasury v. Fabe*, 508 U.S. ——, 113 S. Ct. 2202 (1993); *Osborn v. Ozlin*, 310 U.S. 53 (1940); *California State Auto. Ass'n Inter-Insurance Bureau v. Maloney*, 341 U.S. 105 (1951); McCarran-Ferguson Act, §§ 1011-1015.



extremely important circumstances [23] and this case involves an extremely important circumstance. The Ninth Circuit's formalistic approach—of limiting the applicability of abstention principles on the basis of historical distinctions no longer apt—should not be allowed to stand. It gravely threatens the proper administration of the valuable abstention doctrines developed by this Court.

The opinion of the court below also gravely threatens the administration of insurance insolvencies by the states and, not only erodes principles of federalism, but also frustrates the clear intent of Congress that the business of insurance is to be administered by the states according to state statutes.

### II. AS TO THE REVIEWABILITY OF THE REMAND ORDER.

The decision in this case squarely conflicts with decisions of two other courts of appeals on the question of whether a remand order based on *Burford* abstention is reviewable by appeal under the collateral order doctrine established by this Court in *Cohen*. See *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993); *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31 (2nd Cir. 1988). Further, the decision below is in conflict with this Court's opinion in *Thermtron*, 423 U.S. at 352-53, where the Court enunciated the general rule that "because an order remanding a removed action does not represent a final judgment reviewable by appeal, the remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

The decision also conflicts with this Court's opinion in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). In *Cone*, this Court described the

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[23] See, e.g., *United States v. Lopez*, 514 U.S. ——, 115 S. Ct. 1624 (1995); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *United States v. Five Gambling Devices Labelled in Part "Mills," and Bearing Serial Nos. 593-221*, 346 U.S. 441 (1953).

*Cohen* collateral order test as follows: "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Cone*, 460 U.S. at 11-12 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Recently, this Court has taken steps to confine the collateral order doctrine to cases in which it is truly apt. See, e.g., *Johnson*, 515 U.S. ——, 115 S. Ct. 2151.

The Ninth Circuit's conclusion that the decision to remand in itself satisfies the *Cohen* test is contrary to the decisions in *Doughty* and *Ardra*. In *Doughty*, a state insurance commissioner filed suit in state court to collect reinsurance recoverables, as well as treble damages, from reinsurers of an insolvent insurer. The reinsurers invoked 9 U.S.C. § 205 (1988), removed the suit to federal district court, and sought arbitration and a stay of the proceedings pending the arbitration process. The district court granted a motion to remand made by the Commissioner, concluding that *Burford* abstention principles applied. The reinsurers simultaneously appealed and sought a writ of mandamus of the remand order. The First Circuit determined that the remand order in that case did not pass the *Cohen* test and was not appealable. In contrast to the outcome here, in *Doughty* the First Circuit concluded that the district court's decision to remand did not conclusively determine whether the dispute should be arbitrated, and thus failed to satisfy *Cohen*'s collateral issue requirement. The *Doughty* court stated, "We agree with the Second Circuit that, to come within the collateral order rule, a decree must definitively resolve the merits of the collateral issue, not merely determine which court will thereafter resolve it." 6 F.3d at 863 (citation to *Ardra*, 842 F.2d at 35; *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 970-71 (9th Cir. 1992). The *Doughty* court further decided that the remand order was not immediately appealable because it failed to satisfy a second element of *Cohen* requiring that the disputed issue represent "an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court's discretion." *Id.* (quoting *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 21 (1st Cir. 1985)). The First Circuit in *Doughty* concluded, "We hold, therefore, that an order to remand premised on *Burford* abstention is not immediately appealable under the *Cohen* rubric." *Id.* at 864.



In *Ardra*, a state insurance commissioner sought recovery of reinsurance proceeds due from a reinsurer to an insolvent insurer. The defendant reinsurers removed the action to federal court in an attempt to compel arbitration pursuant to the *Foreign Arbitral Awards Convention*, Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.A. 38. The district court abstained from exercising jurisdiction and remanded to the state court. The reinsurers appealed the remand order, and the New York Insurance Commissioner moved to dismiss the appeal for lack of appellate jurisdiction. The Second Circuit followed *Thermtron*, holding that the order of remand was not a final judgment and, therefore, not subject to review by appeal. The *Ardra* court determined:

> [W]e are compelled to conclude that Ardra's appeal from the remand order must be dismissed, for *Thermtron* makes clear that the proper vehicle for review of a remand order is mandamus, and not appeal: "[B]ecause an order remanding a removed action does not represent a final judgment reviewable by appeal, '[t]he remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done.' "

842 F.2d at 34 (quoting *Thermtron*, 42 U.S. at 352, 53 (quoting *Railroad Co. v. Wiswall*, 90 U.S. 507, 508 (1875)). This outcome by the Second Circuit is in direct conflict with the Ninth Circuit's decision.

In contrast to *Doughty* and *Ardra*, the Ninth Circuit concluded that the remand order was appealable because the decision on abstention constitutes the collateral issue, seemingly rejecting the notion that there must be a separately decided issue of law, such as arbitrability. (App., 6a-7a). Further, in direct conflict with *Doughty*, the court below failed to segregate what is appropriately considered a separate collateral issue and concluded that "determinations of whether a federal or state court should adjudicate the merits of a case constitute separate decisions apart from the merits for the purposes of the final collateral order test." (App., 7a). Accordingly, this decision by the Ninth Circuit squarely conflicts with decisions of both the First and Second Circuits. For these reasons, and because the question vitally affects the proper relation between trial and appellate courts, the issue of whether a remand order based on *Burford* abstention is reviewable on appeal is ripe for review by this Court.

## III. AS TO THE APPROPRIATENESS OF ABSTENTION.

### A. There Is A Conflict Among The Circuit Courts Of Appeals.

The decision below is in direct conflict with several courts of appeals on a matter critical to issues of comity and federalism. Because there is substantial confusion on the issue of whether, post-*NOPSI*, a federal court has the power to abstain in a case such as this one, the issue is ripe for decision by this Court.

The most glaring conflict arises from the recent decision of the Eighth Circuit in *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995). In *Wolfson*, the Eighth Circuit expressly rejected the Ninth Circuit's equity-law distinction in the instant case, holding that *Burford* abstention was appropriate in an insurance insolvency matter regardless of whether "equitable" or "legal" relief was sought. The Eighth Circuit stated,



> Some courts have concluded that *Burford* abstention is only available for claims seeking equitable relief because the Supreme Court has noted the discretionary nature of equitable relief as a factor justifying *Burford* abstention. We think it unwise to make rigid distinctions between legal and equitable claims in the merged federal system, particularly for claims such as those under ERISA whose historical antecedents are unclear.

*Id.* at 147 (citation to David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543, 551-52 (1985)). In *Wolfson*, a beneficiary under a life insurance policy issued by Mutual Benefit Life Insurance Company ("MBL") appealed a series of orders staying her federally-filed action to recover life insurance benefits under an ERISA plan. The district court had stayed plaintiff's action pending further order of the New Jersey state receivership court because while plaintiff's lawsuit was pending, MBL was placed into rehabilitation and the New Jersey Commissioner of Insurance was appointed Rehabilitator. Like the Receivership Court here, the New Jersey court enjoined further prosecution of "any action at law, suit in equity, special or other proceeding against [MBL]." *Id.* at 143. The Eighth Circuit held that the district court's decision to abstain and stay was not an abuse of discretion because MBL was placed in state court insolvency proceedings.

Since the state insolvency scheme provided for the resolution of plaintiff's claim, the *Wolfson* court determined that *Burford* and *Colorado River* abstention were appropriate. Citing *NOPSI*, the court in *Wolfson* stated: "the various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases." *Id.* at 145. "In our view, the Supreme Court's abstention decisions are best viewed as delineating the considerations of federalism, comity, and judicial administration that may justify overriding the strong presumption in favor of exercising federal jurisdiction, not as setting out dis-

crete mechanical tests." *Id.* The reasoning and result in *Wolfson* squarely conflict with the Ninth Circuit's decision below.

There are several other recent circuit court decisions that also conflict with the decision below. In *General Glass Industries Corp. v. Monsour Medical Foundation,* 973 F.2d 197 (3rd Cir. 1992), an insurance insolvency case, the Third Circuit court held that, "Where the district court's exercise of jurisdiction would interfere with ongoing proceedings pursuant to a state regulatory scheme, such as a regulatory scheme concerning the insurance industry, the district court, under a *Burford* analysis, may abstain." *Id.* at 201. The Third Circuit noted that, "Decisional authority remains inconclusive as to whether *Burford* abstention may be ordered *only* in cases of an equitable nature . . . ." *Id.* at 202. In *Riley v. Simmons,* 45 F.3d 764 (3rd Cir. 1995), also an insurance insolvency case, the Third Circuit ruled that abstention was inappropriate because the plaintiff could not receive timely or adequate state court review of its federal claims, but the opinion contains a discussion of the law-equity issue which demonstrates the existing confusion. *Id.* at 772-773, n.7.[24]

There are other decisions which appear to be in conflict. See *Gonzalez v. Media Elements, Inc.,* 946 F.2d 157 (1st Cir. 1991) (court held *Burford* abstention appropriate in money damages case without mention of equity/law distinction); *Hartford,* 913 F.2d 419 (justifying *Burford* abstention without reference to equity/law issue; abstention justified where maintenance of action could result in plaintiff jumping ahead of other creditors

[24] See also the First Circuit's decision in *Fragoso v. Lopez,* 991 F.2d 878 (1st Cir. 1993). In *Fragoso,* the First Circuit refused to abstain on the *Burford* doctrine when the only equitable power the court is asked to exercise is the act of abstention itself.



in specialized claims proceeding and where determination of liability would require federal court to litigate same issues being decided in specialized claims proceeding).[25]

The foregoing cases demonstrate the need for this Court's guidance in this confused area and also show that the impact upon the important field of insurance insolvency is not limited to the instant case, but is sure to recur.

### B. The Decision Below Is Inconsistent With Oher Decisions Of This Court.

The decision of the court of appeals that the very power to abstain does not exist unless the underlying action is in equity conflicts with other decisions of this Court. A reading of this Court's body of decisions relating to abstention demonstrates that the power to abstain arises, not out of mere form, but because of a deeper and overriding policy grounded in principles of judicial federalism, comity, and the need to avoid unnecessary friction between the state and federal systems, particularly where complex issues involving the vital public interests of the states are involved. This Court approved abstention in an action at law in *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 28 (1959) ("These prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect

[25] While not dispositive, there are a number of recent district court opinions conflicting with the decision below, the existence of which serves to demonstrate the extent of disagreement in the federal judicial decisions and the need for this Court to resolve the conflict. See, e.g., *Capitol Indemnity Corp. v. Curiale,* 871 F.Supp. 205 (S.D.N.Y. 1994); *Todd v. DSN Dealer Service Network, Inc.,* 861 F.Supp. 1531, 1539-41 (D. Kan. 1994); *Corcoran v. Universal Reinsurance Corp.,* 713 F.Supp. 77 (S.D.N.Y. 1989); *Crist v. J. Henry Schroder Bank & Trust Co.,* 696 F.Supp. 981 (S.D.N.Y. 1988) (court dismissed, on *Burford* abstention, counterclaim on reinsurance contract dispute against insolvent insurer's receiver in action brought by receiver regarding right to draw on letters of credit).

a deeper policy derived from our federalism."). See also *Ankenbrandt v. Richards,* 504 U.S. 689 (1992) (this Court confirmed a "domestic relations exception" to federal court jurisdiction as to divorce and alimony decrees and child custody orders, and declined to apply *Colorado River* or *Burford* abstention, but stated "It is not inconceivable, however, that in certain circumstances, the abstention principles developed in [*Burford*] might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody. This would be so when a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar."); *Fair Assessment in Real Estate Association v. McNary,* 454 U.S. 100, 102 (1981) (this Court applied basic principles of comity and federalism in a suit brought under 42 U.S.C. § 1983); *Clay v. Sun Ins. Office Ltd.,* 363 U.S. 207 (1960) (this Court certified a question to a state court in a legal action). While none of these cases squarely involved *Burford* abstention, their rationales were very closely related. Indeed, the principles of abstention cannot be separated into watertight compartments.

As recently as in *United States v. Lopez,* 514 U.S. ——, 115 S. Ct. 1624 (1995), this Court focused upon the extreme importance of maintaining a balance of power between the federal government and the states: "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." [26] Justice Kennedy's concurring opinion, with Justice O'Connor joining, notes that absten-

[26] 514 U.S. at ——, 115 S. Ct. at 1626 (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 458).



tion doctrines are important in maintaining this balance.[27] Recent decisions of this Court show great concern over maintaining the dual system of government and the preservation of the prerogatives of the states. In *Five Gambling Devices,* 346 U.S. 441, this Court refused to read into a congressional enactment an intent that the federal government should be able to interfere in an area traditionally within the control of the states. There, this Court affirmed several district court dismissals of indictments charging defendants with engaging in the business of dealing in gambling devices, rejecting the Government's attempt to interpret expansively congressional intent to raise constitutional issues under the commerce power in a field of state and local concern.

In *Gregory,* 501 U.S. 452, this Court refused to interfere with certain mandatory retirement provisions of Missouri state law, recognizing the importance of the federalist structure of joint sovereigns together with the "constitutionally mandated balance of power" between the state and federal governments.

Under the rationale of these decisions, and the many similar ones, one cannot doubt that this Court intends to preserve and protect basic federalism principles and defend the prerogatives of state government. By relying *solely* on the law-equity distinction as its litmus test, the Ninth Circuit opinion in question is out-of-step with these very important precepts as they must be applied to the regulation of insurance by the State of California.

In the instant case, the intent of Congress is not in doubt. With McCarran-Ferguson, *supra,* the Congress expressed its intent that the power to regulate the business

[27] Although in *Lopez* this Court was divided as to the scope of the commerce clause, that issue is not present in the instant case, particularly because Congress has itself determined that the business of insurance should be left in the hands of the states. McCarran-Ferguson Act, 15 U.S.C. § 1011-15.

of insurance be left to the police power of the states. In order to make this concept meaningful, this Court decided in *Fabe* that the "business of insurance" included state court insolvency proceedings. After *Fabe*, it should be clear that the view of this Court and the view of the Congress are completely in accord because both have determined that the regulation of insurance shall be a state function.

To fully and sensitively give effect to congressional intent, and to maintain the federalism principles clearly enunciated by this Court, the Court should protect the ability of the district courts to abstain after making studied judgments as to when a given case should proceed in a single state forum in order to carry out the state statutory mandates.

### C. The Reliance Upon *NOPSI* Is Misplaced.

Although the court of appeals states that Allstate's appeal was based upon the argument that the district court did not have the power to abstain because of *NOPSI* (App., 8a), the briefs filed by Allstate show that it did not actually urge this ground. Allstate only argued that under *NOPSI*, the nature of the underlying action was a factor to be considered, among others.[28] Thus, the Ninth Circuit decision attributes too much to Allstate and grants a position not urged. This point aside, the Ninth Circuit also attributes too much to this Court's *dicta* in *NOPSI*.

Although in *NOPSI* this Court considered equitable principles in determining whether to grant or deny abstention, it did not lay down a "bright line" rule that abstention may be proper *only* in cases involving underlying actions in equity, and further, did not hold that

[28] See Opening Brief of Defendant-Appellant Allstate Insurance Company, dated Nov. 4, 1991, at 28-34; Reply Brief of Appellant, dated Mar. 9, 1992, at 14. (Appendix F, 127a-132a).



abstention is improper when the underlying action is at law. The Commissioner has never argued that the nature of the underlying action should not be considered by the district court in making its decision as to abstention. The Commissioner simply argued that the nature of this underlying action strongly militates in favor of abstention. The district court agreed.

Unfortunately, there is no doubt that *NOPSI* has generated a great deal of discussion and controversy.[29] The instant case provides this Court with an excellent opportunity to clarify whether it intended to establish the hard and fast rule that federal courts may never abstain in actions at law. Indeed, the Ninth Circuit opinion itself, very narrowly focused as it is, seems to reach out for such clarification. The conflicting opinions cited above demonstrate that the mere existence of the current confusion among the courts and the debate over this issue interferes with the smooth and efficient operation of the federal courts and state court insurance insolvency proceedings as well. Instead of focusing upon the job mandated by the state statutory scheme, the Commissioner may be forced to defend basic provisions of that system in the federal courts. The situation, therefore, urgently needs clarification by this Court.

### D. It Is Inappropriate To Base Abstention Doctrine On The Dichotomy Between Actions At Law And Equity.

The continuation of the ancient dichotomy between actions at law and actions in equity is subject to criticism, see, e.g., David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 551-553 (1985), and this case serves to show the difficulties that such a rule would

[29] Gordon G. Young, *Federal Court Abstention and State Administrative Law from Burford to Ankenbrandt: Fifty Years of Judicial Federalism Under Burford v. Sun Oil Co. and Kindred Doctrines*, 42 DePaul L. Rev. 859 (1993).

present. This is particularly true where most state courts and all federal district courts operate under a procedure in which law and equity have merged.

Maintenance of the dichotomy between law and equity is particularly difficult in cases such as this case, which involves special proceedings in state court and in which the underlying litigation has multiple causes of action, some sounding in law and others in equity. For example, the record clearly reveals that this case involves an action for declaratory relief,[30] a set-off defense, and special (equitable) liquidation proceedings. The case also involves claims for money damages. These circumstances raise numerous difficulties with any attempt to characterize precisely the case as purely an action at law or an action in equity. Sophisticated modern business transactions create multifaceted disputes which result in multi-count lawsuits. Very frequently suits will involve actions at law, actions in equity, actions for declaratory judgment and actions under federal or state statutes. If this Court mandates that abstention may occur in actions in equity, but not as to actions at law, then suits which contain special statutory causes of action or various combinations of legal and equitable actions will be left outside the scope of the abstention doctrine. The instant case is particularly vulnerable to this confusion because state insurance insolvency proceedings are "special proceedings," and are not the typical adversarial litigation. *Carpenter*, 10 Cal.2d at 327, 74 P.2d at 773; *Abraugh v. Gillespie*, 203 Cal. App.3d 462, 468, 250 Cal. Rptr. 21, 24-25 (1988); *Anderson*, 41 Cal. App. 2d at 188-189, 106

[30] In matters of state law, state law governs the decisions of federal courts. *Erie v. Tompkins*, 304 U.S. 64 (1938). California courts have recognized that "An action for declaratory relief is equitable." *Westerholm v. 20th Century Ins. Co.*, 58 Cal. App.3d 628, 632, 130 Cal. Rptr 164, 166 n.1 (1976); *Culbertson v. Cizek*, 225 Cal. App.2d 451, 462, 37 Cal. Rptr. 548, 553 (1964). Federal courts reach a similar result. See, e.g., *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962).



P.2d at 79. The action by an insurance commissioner such as the underlying litigation between Allstate and the Commissioner is not a mere collection action at law.

The Ninth Circuit seems to view the maintenance of the law-equity distinction as necessary to justify federal court abstention at all. A reading of the opinion of the court below and the authorities it relies upon reflects that, in an action "at law," the Ninth Circuit adopts the rigid premise that a federal court must exercise its jurisdiction and has no alternative but to do so. (App., 8a-12a). The long-standing abstention doctrines, however, demonstrate that there is not and cannot be such a rigid rule. To permit abstention only when the underlying cause of action would have been one in equity in an earlier era would be wholly inappropriate, both as a practical matter and as a matter of sound policy.

The better view is to consider abstention, in proper circumstances, as an exercise of the court's legitimate and principled discretion—a discretion that transcends historical distinctions between law and equity.

The instant case brings these issues to focus. Where an insurance receiver seeks a declaration of the rights and interests of the parties under the reinsurance agreements. this action serves not only to permit the determination of rights and duties between Allstate and the Mission Companies under sophisticated reinsurance arrangements, but also to protect the rights and interests of innocent policyholders of the Mission Companies in the underlying state court insolvency proceedings, which, like bankruptcy proceedings, are inherently equitable in nature. *Katchen v. Landy*, 382 U.S. 323, 336-337 (1966); *Pepper v. Litton*, 308 U.S. 295, 304 (1939); *Garamendi v. Executive Life Ins. Co.*, 17 Cal. App.4th 504, 516, 21 Cal. Rptr.2d 578, 586, *rev. denied* (1993); *Kinder v. Superior Court*, 78 Cal. App.3d 574, 144 Cal. Rptr. 291, 296 (1978); *Anderson*, 41 Cal. App.2d at 188, 106 P.2d at

79; see also *Morgan Stanley Mortgage Capital, Inc. v. Insurance Commissioner*, 18 F.3d 790, 794 (9th Cir. 1994).

Moreover, Allstate's primary defense of set-off is, in and of itself, a prayer for equitable relief, see *Prudential*, 3 Cal.4th at 1124, 842 P.2d at 50-51, 14 Cal. Rptr.2d at 751-752, and, thus, it will be determined under state law as a part of the declaratory relief action in the Receivership Court. While not squarely on point, this Court's decision in *Wilton v. Seven Falls, Co.*, 515 U.S. ——, 115 S. Ct. 2137 (1995),[31] highlights the importance of this issue because the Court refused to apply a rule that would force federal courts blindly to assume jurisdiction over declaratory judgment actions absent exceptional circumstances. The instant case not only involves a declaratory judgment action and a pending court proceeding as was the situation in *Wilton*, but it even has exceptional circumstances.

Thus, the very nature of this case, as part of a complex, multi-party controversy arising under an elaborate system of state regulation, makes it an ideal vehicle for determining whether the ability to abstain should turn solely on whether a particular suit is one in "law" or "equity."

### E. The Decision Below Interferes With California's Statutory Scheme.

This case presents questions of national importance involving comity and federalism requiring deference to California's complex and specialized administrative framework for insurance company insolvencies. This Court has long recognized that the business of insurance is affected with the vital public interest and its regulation is within the police power of the states. *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914); *Osborn*, 310 U.S. 53; *Maloney*, 341 U.S. 105. Congress has manifested its intent that the regulation of the business of insurance be left to the states. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. This Court recognized this congressional intent in *Fabe*, 508 U.S. ——, where this Court confirmed that a state statute governing the priority of claims against an insolvent insurer is a law enacted for the purpose of regulating the business of insurance and that such state statutes must be given preference over the federal priority statute. In *Fabe*, this Court established a strong deference to state statutes (which protect policyholders) in insurance liquidations, thereby giving effect to the McCarran-Ferguson Act and the public policy considerations behind it.

The instant case presents issues which are no less critical to the systematic conduct of state court insolvency proceedings because the decision below elevates form over substance creating a rigid rule forbidding federal court abstention in insurance insolvency cases where the underlying action is deemed purely an action at law.[32] This rule would insert the equity-law distinction into the state statutory scheme and would be a classic disruption of federalism. The Ninth Circuit rule would create an anomalous situation where an entity could file a claim in the receivership proceedings pursuant to the state statutory scheme, but could also assert the right to remove the matter to a federal court. Allstate is not the only reinsurer to claim the right to set off in the liquidation proceedings, nor is it the only reinsurer to allege the equitable defense of set-off in litigation filed by the Commissioner to recover reinsurance recoverables. The result of approving the Ninth Circuit rule, at least as interpreted by Allstate, would be to permit multiple removals of claims to multiple federal courts.

Such a result is particularly inappropriate in this case where the Receivership Court has *in personam* jurisdic-

[31] See also *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942).

[32] The Commissioner asserts that it is incorrect to hold the underlying litigation as purely an action at law in any event.

tion over both the Commissioner and Allstate [33] and the key issues are presented by claims filed in the receivership proceedings by Allstate in accordance with the California claims statutes. It makes no sense to permit an unnecessary and unsuitable equity-law distinction to control the modern realities of the insurance business and applicable insurance receivership law and thereby undermine the principles established in cases such as *Fabe* and *Lopez*. In the context of an insurance insolvency such distinctions are not a productive use of judicial resources nor an efficient use of the available assets of an already insolvent insurance company whose innocent policyholders have been damaged and who already face substantial delays in the payment of their claims.

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[33] Part of Allstate's claim in the MIC liquidation proceedings was for money damages. It also alleged the equitable right to set off. As discussed above, Allstate maintains, among other things, that it may set off whatever amounts it owes MIC against amounts MIC may owe to Allstate. Allstate also raised this set-off defense in the instant lawsuit filed by the Commissioner to collect reinsurance proceeds from Allstate. Thus, Allstate has already subjected itself to the jurisdiction of the Receivership Court on the same issue.



## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 91-55855

D.C. No. CV-90-4713-WMB

JOHN GARAMENDI, Insurance Commissioner of the State of California, in his capacity as Liquidator of MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, HOLLAND-AMERICA INSURANCE COMPANY AND MISSION REINSURANCE CORPORTION, as successor to ROXANI GILLESPIE, Insurance Commissioner of the State of California, in her capacity as Liquidator of MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, HOLLAND-AMERICA INSURANCE COMPANY AND MISSION REINSURANCE CORPORATION,

*Plaintiff-Appellee,*

v.

ALLSTATE INSURANCE COMPANY,

*Defendant-Appellant,*

and

INSURANCE COMPANY OF NORTH AMERICA,

*Defendant.*

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Appeal from the United States District Court
for the Central District of California
Wm. Matthew Byrne, Jr., District Judge, Presiding

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Argued and Submitted
November 5, 1993—Pasadena, California

Filed February 2, 1995

Before: Betty B. Fletcher, Harry Pregerson,
and William A. Norris, Circuit Judges.

Opinion by Judge Norris

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## OPINION

NORRIS, Circuit Judge:

This case presents two questions: First, whether a remand order based on abstention is reviewable, and, if so, whether it can be reviewed on appeal, or only by a petition for a writ of mandamus. Second, and more importantly, we consider whether the *Burford* abstention doctrine allows a federal court to surrender jurisdiction to a state court in a case in which no equitable relief is sought.

The district court remanded this case to state court under the *Burford* abstention doctrine. Allstate filed a notice of appeal, which it requested be considered as a petition for a writ of mandamus if review by appeal was not available. Treating this action as an appeal, we reverse because abstention was inappropriate.

### I

John Garamendi is the Insurance Commissioner (the "Commissioner") of the State of California and the statutorily designated trustee for insolvent insurance companies.[1] This case arises out of the Commissioner's efforts to liquidate the Mission Group of Insurance companies and recover reinsurance proceeds from several reinsurers, including Allstate Insurance Company ("Allstate").

[1] John R. Garamendi succeeded Roxani Gillespie on January 6, 1991 as Insurance Commissioner of the State of California.



Between 1962 and 1985, Allstate and the Mission Insurance Group [2] entered into numerous reinsurance agreements, pursuant to which each company reinsured the primary insurance obligations of the other. On October 31, 1985, the Commissioner filed an application in Los Angeles County Superior Court ("the Liquidation Court") requesting the appointment of a conservator for the company.[3] The Liquidation Court first ordered the Mission Insurance Group into conservatorship, and then, upon determining that it could not be rehabilitated, ordered that it be liquidated. In August, 1990, the Liquidation Court appointed the Commissioner as liquidator. Pursuant to the California Insurance Code, the Commissioner filed suit on December 22, 1986 against approximately 300 reinsurers of the Mission Insurance Group seeking to recover money due the Mission Insurance Group under various reinsurance agreements. That case was filed in Los Angeles Superior Court (*"Gillespie I"*) and subsequently consolidated with the liquidation proceedings.

In June, 1990, the Commissioner filed this action against Allstate and other insurance companies, alleging the same causes of action alleged in *Gillespie I*.[4] On August 2, 1990, Allstate sought removal of the action on diversity grounds to federal district court under 28 U.S.C. § 1441(c). Once in district court, Allstate moved to compel arbitration, pursuant to an arbitration clause in

[2] The Mission Insurance Group consists of the following companies: Mission Insurance Company and its subsidiaries Mission National Insurance Company and Enterprise Insurance Company; Mission Reinsurance Corporation; and Holland-America Insurance Company.

[3] The procedures followed by the Commissioner are set forth in Cal. Ins. Code § 1010 *et seq.*

[4] The causes of action included: declaratory relief; suit on contract, conspiracy to breach and to commit tortious breach and tortious breach of the implied covenant of good faith and fair dealing; and conspiracy to commit tort and tortious denial of the existence of contracts.

the reinsurance agreement. Before entertaining the motion, the court heard the Commissioner's motion to remand the action to the state court, which it granted on July 1, 1991.

The district court pointed out that a critical issue in this case is the viability of Allstate's defense that it is entitled to a set-off for the amounts it claims Mission owes it from other reinsurance agreements.[5] Noting that Liquidation Court Judge Kurt Lewin had developed an "intimate familiarity" with the law in this area by presiding over *Gillespie I*, the district court accepted the Commissioner's argument that *Burford* abstention required it to remand the case to state court because exercising jurisdiction would interfere with a comprehensive state regulatory scheme. Allstate timely appealed to this court.

## II

The Commissioner argues that the district court's abstention order is unreviewable, either by appeal or a writ of mandamus, citing 28 U.S.C. § 1447(d), which states "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," with a single exception, not applicable to this case. This provision, however, applies only to cases remanded pursuant to § 1447(c), when there is a "defect in removal procedure" or "the district court lack[ed] subject matter jurisdiction." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-52 (1976); *see also Price v. PSA, Inc.*, 829 F.2d 871, 874 (9th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988) (noting that if an order of remand is "not a mandatory remand under § 1447(c), it enjoys no immunity from review"). Here,

[5] Obtaining a set-off is crucial to Allstate because it would entitle Allstate to deduct the money the Mission Group owes Allstate under the reinsurance contracts from the money it owes the Mission Group. If Allstate is not entitled to a set-off, it will have to pay Mission and then try to collect what Mission owes it as one of many creditors in the liquidation proceedings.



the district court explicitly based its remand order on a decision to exercise its discretion to abstain from a case that might interfere with a state administrative proceeding, rather than on any ground specified in § 1447(c). Therefore, review of the remand order in this case is not barred by § 1447(d). The question, then, is whether it is appealable, or reviewable only by a writ of mandamus.[6]

In *Thermtron Products*, the Supreme Court stated that "*because* an order remanding a removed action does not represent a final judgment reviewable by appeal, the remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done." 423 U.S. at 352-53 (emphasis added). The Supreme Court subsequently noted, however, that some orders declining to exercise jurisdiction may be appealable under a narrow exception to the final judgment rule. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11-13 (1983). Describing the exception to finality rule as established in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), the Court held that an abstention order may be appealable as a final collateral order if it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the actions, and [is] effectively unreviewable on appeal from a final judgement." *Id.* at 11-12 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The Court held that an order staying a federal action pursuant to abstention under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) qualifies as an appealable final col-

[6] The method of review will determine the standard of review. Mandamus is available only when there has been a usurpation of judicial power or a clear abuse of discretion below. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). On appeal, we review the applicability of an abstention doctrine de novo and the decision to abstain for abuse of discretion. *See Privitera v. California Bd. of Medical Quality Assurance*, 926 F.2d 890, 895 (9th Cir. 1991).

lateral order. *Cone*, 460 U.S. at 11-13. The question, then, is whether a *remand* order may also be appealable as a final collateral order when a district court declines to exercise jurisdiction pursuant to one of the doctrines of abstention.

In the wake of *Moses H. Cone*, we held that a remand order, like a stay, may be appealable as a final collateral order under *Cohen*, *Pelleport Investors v. Budco Quality Theaters*, 741 F.2d 273, 278 (9th Cir. 1984). Thus, despite the general rule in *Thermtron*, a remand order may be appealed as a final collateral order if it is "based on a substantive determination on the merits apart from any jurisdictional.'" *Lee v. City of Beaumont*, 12 F.3d 933 (9th Cir. 1993) (quoting *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1180 (9th Cir. 1989); *see also Executive Software v. United States Dist. Ct.*, 24 F.3d 1545 (9th Cir. 1994). Applying the *Cohen* test to the order in this case, we conclude that a remand order based on abstention is a final collateral order that is reviewable on appeal.

The order in this case satisfies each of the three criteria of the final collateral order test. First, the order conclusively determines a disputed question: whether the facts of the case warrant abstention under *Burford v. Sun Oil*, 319 U.S. 315 (1943). *See Moses H. Cone*, 460 U.S. at 12-13 (concluding that stay based on abstention conclusively determines the applicability of the relevant abstention doctrine).

There can be no dispute that the decision also satisfies the second criterion of the final collateral order test. In *Moses H. Cone*, the Supreme Court held that an "order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits." 460 U.S. at 12. This holding was based on the understanding that the "completely separate from the merits" requirement is merely "a distillation of the principle that



there should not be piecemeal review of 'steps towards final judgment in which they will merge.'" *Id.* at 12 n.13 (quoting *Cohen*, 337 U.S. at 546). In this case, as in *Moses H. Cone*, "there is no step towards final judgment, but a refusal to proceed at all." *Id.* Moreover, in several cases we have concluded that determinations of whether a federal or state court should adjudicate the merits of a case constitute separate decisions apart from the merits for the purposes of the final collateral order test. *See Pelleport*, 741 F.2d at 278; *Clorox v. United States District Court*, 779 F.2d 517, 519-20 (9th Cir. 1985).[7]

Finally, a remand based on abstention would be effectively unreviewable on appeal after a determination of the merits "because it puts the parties out of federal court." *Pelleport*, 741 F.2d at 278. Moreover, a federal court's decision to abstain would be "unreviewable if not appealed now" because the federal court would be bound to honor the state court's determination on the merits as res judicata. *See Moses H. Cone*, 460 U.S. at 12.

Because the district court's order of remand in this case qualifies as a final collateral order, we will treat

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[7] We have held on several other occasions that a district court's decision to remand pendent state claims after the attached federal claims have dropped from the case may be reviewed only by mandamus. *See Executive Software v. United States Dist. Ct.*, 24 F.3d (9th Cir. 1994); *Lee v. City of Beaumont*, 12 F.3d 933, 936 (9th Cir. 1993); *Price v. PSA, Inc.*, 829 F.2d 871, 874 (9th Cir. 1987); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 865-66 (9th Cir. 1987); *Survival Systems v. U.S.D.C.*, 825 F.2d 1416, 1418 (9th Cir. 1987). We explained that in such cases the final collateral order doctrine does not apply because the decision to decline to hear pendent state law claims was wholly discretionary and, therefore, not a substantive decision. However, as noted above, the Supreme Court has held that the decision to decline jurisdiction under one of the established doctrines of *abstention* is a substantive determination apart from the merits for purposes of applying the final collateral order doctrine. To the extent there is a tension between these two lines of decision, we must follow the clear holdings of the Supreme Court.

Allstate's request for review as an appeal. There is no discretion to abstain in a case that does not meet the requirements of the abstention doctrine being invoked. *Privitera v. California Board of Medical Quality Assurance*, 926 F.2d 890, 895 (9th Cir. 1991). We review whether those requirements are met de novo. *Gartrell Constr., Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991); *Privitera*, 926 F.2d at 895. When those requirements are met, the district court's decision whether or not to abstain is reviewed for an abuse of discretion. *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359, 360 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1052 (1994).

III

Relying on the abstention doctrine articulated in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the district court abstained from hearing this case. Appellant argues that the court abstained inappropriately because *Burford* abstention does not apply to suits seeking solely legal relief.[8] We agree.

Under 28 U.S.C. § 1332, the District Court in this case clearly had jurisdiction.[9] It is undisputed that "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989) [hereinafter "*NOPSI*"]. The threshold question, then, is under what conditions, if any, Congress intended to permit courts to abstain from exercising the jurisdiction conferred under § 1332.

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[8] Appellant further argues that, in any event, this case does not meet the requirements for abstention under *Burford*. Because we hold that the *Burford* doctrine does not apply to suits seeking solely legal relief, we do not reach this question.

[9] 28 U.S.C. § 1332 provides: "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs and is between . . . citizens of different states . . . ."



Although courts have consistently construed congressional grants of jurisdiction as imposing on federal courts a "virtually unflagging obligation . . . to exercise the jurisdiction given them," *e.g., Colorado River*, 424 U.S. at 817, the Supreme Court has decided that Congress intended to leave the judiciary a degree of discretion in a small subset of cases. Historically, courts of Chancery exercised significant discretion in determining whether to grant equitable relief, as did common law courts in issuing the "prerogative writs" of habeas corpus, certiorari, mandamus and prohibition. *See* David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 572 (1985). Early courts did not have comparable discretion to decline to grant ordinary legal relief. *Id.* at 571-72. The First Judiciary Act of 1789, which created the jurisdiction of the federal district courts, apparently was not intended to deprive courts of this equitable discretion. *See* 1 Stat. 73 (1789). Therefore, courts presumed that they retained the ability to refuse equitable relief or even decline to hear cases in equity. *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500-501 (1941); *NOPSI*, 491 U.S. at 359. The Supreme Court subsequently created rules for the exercise of this discretion to decline to hear cases in equity, developing several doctrines of abstention. *See, e.g., Colorado River*, 424 U.S. 800; *Younger v. Harris*, 401 U.S. 37 (1971); *Burford*, 319 U.S. 315; *Pullman*, 312 U.S. 496.

In *Burford*, the Supreme Court explicitly premised its order of abstention on the power, unique to courts of equity, to refuse, for policy reasons, to exercise their jurisdiction:

> Although a federal *equity court* does have jurisdiction of a particular proceeding, it may, in its sound discretion . . . refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest. . . .

319 U.S. at 317-18 (quotation marks and citations omitted) (emphasis added). In *Alabama Public Service*

*Commission v. Southern Ry. Co.*, 341 U.S. 341 (1951), the only other case in which the Supreme Court has upheld a *Burford* abstention, the power to abstain was again grounded in the discretion afforded equitable courts in granting relief:

> This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts . . . . On the contrary, it is but a recognition . . . that a federal *court of equity* . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer . . .
>
> It is in the public interest that federal *courts of equity* should exercise their *discretionary power to grant or withhold relief* so as to avoid needless obstruction of the domestic policy of the states.

341 U.S. at 350-51 (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-98 (1943)) (emphasis added).

*Burford* abstention is not the only abstention doctrine grounded in the unique power of courts of equity. Cases involving other abstention doctrines also emphasized that the source of the courts' authority to develop a doctrine of abstention was based upon the discretion to decline or grant equitable relief. *See Baggett v. Bullitt*, 377 U.S. 360, 375 (1964); *Younger*, 401 U.S. at 43; *Pullman*, 312 U.S. at 500-501.

The reasoning of *Burford*, *Pullman* and the other cases locating the power to abstain in the unique powers of equitable courts has never been rejected. The Supreme Court has, however, subsequently applied some forms of abstention doctrine to cases at law, without discussion.[10]

[10] *See Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960).



Furthermore, the Supreme Court explicitly expanded some forms of abstention to a few "special" classes of damage actions.[11] These cases were severely criticized by dissenting justices. In his dissent in *Fair Assessment in Real Estate Association v. McNary*, Justice Brennan pointed out that "[w]hile the 'principle of comity' may be a source of judicial policy, it is emphatically no source of judicial *power* to renounce jurisdiction. . . . There is little room for the 'principle of comity' in actions at law where, apart from matters of administration, judicial discretion is at a minimum." 454 U.S. 100, 119-21 (1981) (Brennan, J., dissenting).

The recent Supreme Court decision in *NOPSI* suggests a renewed recognition that the power of federal courts to abstain from exercising their jurisdiction, at least in *Burford* abstention cases, is founded upon a discretion they possess only in equitable cases. The Court noted that the authority to abstain is rooted in the "federal courts' discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted." 491 U.S. at 359. The Court made clear that this discretion in granting "certain types of relief" belongs to "a federal court *sitting in equity* [which] must decline to interfere with the proceedings or orders of state administrative agencies" when the *Burford* criteria are met. 459 U.S. at 361 (emphasis added). By locating the source of the power to abstain in historical equitable discretion, while also reminding courts that their obligation to hear cases within their jurisdictional grants is

[11] *See Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 (1981) (citing the "important and sensitive" nature of challenges to state tax systems); *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28 (1959) ("Although an eminent domain proceeding is deemed for certain purposes of legal classification a 'suit at common law' . . . it is of a special and peculiar nature").

"virtually unflagging," *id.*, the Supreme Court gave strong indication that the power to abstain under *Burford* should not apply in suits at law.

NOPSI provided such a strong affirmation of *Burford* abstention's ties to equity that other circuits have been provoked to reconsider the application of *Burford* abstention to cases at law. The Third Circuit declined to follow a prior case that had applied *Burford* to damage actions because the prior case "predated *NOPSI*, and the Supreme Court in *NOPSI* has given no indication that the distinction between legal and equitable relief has been diluted." *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 272 (3d Cir. 1991) (rejecting *Lac D'Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033 (3d Cir. 1988)); *see also Fragoso v. Lopez*, 991 F.2d 878, 882 (1st Cir. 1993) (stating that in light of *NOPSI*, the fact that the plaintiffs sought only legal relief was a reason to decline to apply *Burford* abstention); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 270 D. Vt. 1993) (finding, in a case between a reinsurer and state insurance commissioner acting as liquidator for an insolvent insurer, that *NOPSI* limits *Burford* abstention to equitable cases); *Duane v. Government Employees Ins. Co.*, 784 F. Supp. 1209, 1223 (D.Md. 1992) (holding that *Burford* abstention is limited to equitable cases).

The Supreme Court's recent, restrictive reading of *Burford*, together with its reaffirmation of the doctrine's equitable predicate, leads us to conclude that a district court may not abstain under *Burford* when the plaintiff seeks only legal relief.

The district court's remand order is VACATED and the case is REMANDED for proceedings consistent with this opinion.



**APPENDIX B**

[Filed July 1, 1991]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CV 90-4713-WMB

ROXANI GILLESPIE, Insurance Commissioner of the State of California, in her capacity as LIQUIDATOR OF MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, HOLLAND-AMERICA INSURANCE COMPANY, and MISSION REINSURANCE CORPORATION,

*Plaintiffs,*

v.

ALLSTATE INSURANCE COMPANY, *et al.*,

*Defendants.*

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ORDER

This action arises out of the efforts of the California Commissioner of Insurance ("the Commissioner") to liquidate the Mission Group of Insurance companies and obtain reinsurance proceeds from numerous reinsurers, including defendant Allstate Insurance Company ("Allstate"). To date, this effort has been conducted in state court. Allstate removed the case against it to this Court and the Commissioner now seeks to remand the case back to state court. Although defendant has presented a cogent and relatively novel argument urging that the *Burford* abstention doctrine be construed very narrowly, the Court finds that abstention is appropriate in this case; accordingly, the Commissioner's motion to remand is granted.

## I. FACTUAL AND PROCEDURAL BACKGROUND

A group of insurance companies, the "Mission Companies," [1] were ordered into conservatorship by the Los Angeles County Superior Court ("the Liquidation Court") in late 1985. On February 24, 1987, the same court ordered that the Mission Companies be liquidated. In August of 1990, the Liquidation Court approved a series of transactions including a transfer of the assets and liabilities of the Mission Companies into trusts and appointment of plaintiff-Commissioner as trustee of those trusts.[2]

In accordance with her statutory authority, Commissioner Gillespie [3] filed suit on December 22, 1986 against approximately 300 reinsurers of the Mission Companies seeking to recover money allegedly due the Mission Companies under various reinsurance agreements. That case was filed in L.A. Superior Court (Case No. C629709, "*Gillespie I*") and later consolidated with the liquidation proceedings (Case No. C572724). Judge Kurt J. Lewin has presided over the Superior Court proceedings in *Gillespie I*, developing an intimate familiarity with the facts giving rise to this litigation.

A critical issue in all these liquidation-related cases,[4] including this one, is whether or not the reinsurers are

[1] The companies comprising the "Mission Companies" include: Mission Insurance Company and its subsidiaries Mission National Insurance Company and Enterprise Insurance Company; Mission Reinsurance Corporation; and Holland-America Insurance Company.

[2] The actions of the Liquidation Court are the sole means under the California Insurance Code's statutory framework for an insurance corporation to be rehabilitated, reorganized or liquidated. *California Insurance Code*, §§ 1010 *et seq.*

[3] Ms. Gillespie has been succeeded by Mr. Garamendi as California's Insurance Commissioner. This Order will endeavor, therefore, to refer to plaintiff simply as the Commissioner.

[4] Under Section 1019 of the California Insurance Code, once a liquidation order is issued, as was done here in February of 1987,



entitled to "set-off" amounts allegedly owed to Mission under the reinsurance contracts. If Allstate prevails on its set-off defense, it could deduct the set-off figure directly from the total amount it owes to the Mission companies under the reinsurance agreements. If Allstate's set-off claims are unsuccessful, then it would pay all amounts owed to Mission up front, and Allstate's set-off claims would be treated like any other Class 6 creditor claim against the Mission assets. Pratically speaking, then, resolution of this issue will dramatically impact on who ultimately receives the Mission assets.

In June of 1990, the Commissioner filed this action against Allstate and other insurance companies. The complaint alleges causes of action [5] which are identical to the amended complaint in *Gillespie I*; thus, the only difference in the suits are the named defendants. The complaint was served on Allstate and one other insurer (Insurance Company of North America, INA) in August of 1990. A notice of related case accompanied the complaint, and the action was referred to Judge Lewin.

Allstate sought removal pursuant to 28 U.S.C. § 1441 (c) on the ground that the Commissioner's claims against Allstate would have been removable under the Court's diversity jurisdiction if sued upon alone, and were "separate and independent" of claims asserted against other defendants in this action. At that time, complete diversity was lacking. Upon petitioning for removal, Allstate simultaneously sought an order compelling arbitration of the Commissioner's claims against Allstate, as allegedly

the rights and liabilities of all creditors and debtors shall be fixed as of the date the order was entered. Thus, according to the Commissioner, Allstate's remedies in this action are only those permitted by the insolvency statutes.

[5] These causes of action are for: declaratory relief; suit on contract; conspiracy to breach and to commit tortious breach and tortious breach of the implied covenant of good faith and fair dealing; and conspiracy to commit tort and tortious denial of the existence of contracts.

mandated by the reinsurance contracts between Allstate and the Mission companies.

The Commissioner moved to remand this action. At the initial hearing, the Court intimated that the action would be remanded on abstention grounds, in particular under the *Burford* doctrine,[6] and formally took the matter under submission.

While the matter was pending, the Commissioner dismissed all non-diverse defendants in the state court action, and Allstate filed a Supplemental Notice of Removal, reciting the presence of complete diversity in this lawsuit as an additional ground for removal. The parties then briefed and reargued the remand motion.

## II. DISCUSSION

The Commissioner advances three contentions[7] in support of its remand motion: (1) that the Court lacks jurisdiction over this dispute due to the Liquidation Court's *in rem* jurisdiction over the assets of the Mission Companies; (2) that abstention is appropriate under *Colorado River*; and (3) that abstention is warranted under the *Burford* doctrine. While basing this holding on *Burford*, the Court will first address plaintiff's other grounds for remand.

### A. *The Court Has Jurisdiction Over This Dispute*

In a supplemental order issued April 25, 1990, Judge Lewin stated that:

> This Court continues and reaffirms its assumption of exclusive and continuing jurisdiction over all of the

[6] *Burford v. Sun Oil Co.*, 63 S.Ct. 1098 (1943).

[7] Initially, the Commissioner also argued that Allstate's claims were not "separate and independent" from the plaintiff's claims against the other reinsurers; thus, removal under 28 U.S.C. § 1441(c) was inappropriate. The presence of complete diversity, however, moots the question of whether or not this action was improvidently removed under 28 U.S.C. § 1441(c).



> [assets of the Mission Companies] . . . and continues to assume sole and exclusive jurisdiction to administer [assets] and to determine the validity or invalidity of any and all claims to or affecting such assets.

Final Order of Rehabilitation, paragraph 5 (Exhibit L to plaintiff's Request for Judicial Notice).

By issuing this supplemental order, the Commissioner argues that the Liquidation Court has exercised *in rem* jurisdiction over the *res* of the Mission Company assets, and that these assets include any potential payment of reinsurance balances owed. Thus, the Commissioner urges this Court to follow the rule that where a court has taken property into its possession, that property is withdrawn from the jurisdiction of all other courts. *Lion Bonding & Surety Co. v. Karatz*, 43 S.Ct. 480, 484 (1923). "Possession of the res disables other courts of coordinate jurisdiction from exercising any power over it." *Id.*[8]

The Court finds this argument unpersuasive. As Allstate correctly observes, the Liquidation Court has issued other orders authorizing the Commissioner to seek redress in other forums, including federal court. Thus, plaintiff's suggestion that this Court lacks the competency to adjudicate matters affecting the Mission *res* rings somewhat hollow.

In addition, many of the cases the Commissioner cites in support of this jurisdictional argument involve a state court which has taken *in rem* jurisdiction over a particular asset or estate, and then another court was asked to assert *in rem* jurisdiction over the same assets. For example, in *Lion Bonding*, a state court had appointed

[8] In *Lion Bonding*, the Supreme Court held, inter alia, that a federal court in Minnesota could not take the *res* out of the possession and control of a Nebraska state court arising from the insolvency of the Lion Bonding & Surety Company.

receivers for an insolvent insurer and had vested the receivers with title to the insolvent's assets. Thereafter a creditor of the insolvent brought a federal court suit seeking the appointment of another receiver and an order vesting him with title to the assets—i.e., an order "to take the res out of the possession and control of the state court" and transfer it to a federal receiver. *Lion Bonding*, 43 S.Ct. at 484.[9]

Other cases have disputed whether the potential for reinsurance balances may be characterized as part of any *res*. In *Slotkin v. Brookdale Hosp. Center*, 357 F. Supp. 705 (S.D.N.Y. 1972), the plaintiff sued a state insurance commissioner acting as liquidator of an insolvent insurer. In rejecting the commissioner's argument that hearing the suit would interfere with the state court's *in rem* jurisdiction, the court stated:

> '[W]here the State Court has control of the administration of . . . [an] estate, an action *in personam* may be instituted in the federal court . . . to establish the validity and amount of a claim against the estate, since the federal court's action in no way interferes with the state court's control of the *res*.' [citations omitted]. . . This cause of action, to decide a claim against funds being administered by the State court, in no way interferes with the State's custody or control of the *res*.

*Slotkin*, 357 F. Supp. at 707-708.

Similarly, the court in *Fabe v. Columbus Ins. Co.*, LEXIS No. 2650 (Ohio App. June 26, 1990), stated:

[9] Also, *Underwriters Nat'l Assurance Co. v. North Carolina Life*, 102 S.Ct. 1357 (1982), is not on point because the dispute there centered on which state court (either Indiana or North Carolina) had jurisdiction over a $100,000 "financial security" deposit made by an Indiana stock insurance corporation who did business in North Carolina. The thrust of the holding involved enforcement of "the full faith and credit" clause as between two states, and did not address the jurisdiction of a federal court in disputes such as this one.



> "[u]ntil the dispute regarding ownership of the funds is resolved, those funds are not part of the assets over which plaintiff [insurance commissioner] has control." [10]

For these reasons, the Court finds that it has jurisdiction to rule on this case.[11] The question then becomes whether the Court should refrain from exercising its jurisdiction under any of the established abstention doctrines.

B. *Abstention Under Colorado River is Inappropriate*

In *Colorado River Water Conservation District v. United States*, 96 S.Ct. 1236 (1986), the Supreme Court found that a district court may stay or dismiss an action in light of a concurrent state proceeding if it comports with a sense of "wise judicial administration" which gives "regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River*, 96 S.Ct. at 1246.

The Supreme Court enumerated several factors for a district court to consider when determining the applicability of this abstention doctrine: whether a court has obtained *in rem* or *quasi in rem* jurisdiction over the property subject to dispute;[12] the inconvenience of the

[10] *See also, Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 702-03 (10th Cir. 1988), *cert. denied*, 109 S.Ct. 1568 (1989) (in holding that district court should have abstained from hearing an insurance commissioner's declaratory rights claim against a diverse reinsurer, the court rejected the proposition that "a state statute, even when buttressed by the federal policy expressed in the McCarran-Ferguson Act, can affect the invocation of federal diversity jurisdiction.")

[11] The Commissioner also observes that the exclusive jurisdiction assumed by the Liquidation Court is intended to protect the *res* from one of the most *res*-dissipating expenses—litigation expenses caused by a multitude of law suits filed in a multitude of forums. While this observation may be true, the Court believes it applies more directly to the dispositive issue of federal abstention than to that of this Court's jurisdictional capacities.

[12] This issue has been addressed earlier.

federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. *Id.* at 1246-47. "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id.* at 1247.

The Commissioner asserts that these factors militate toward abstention in that: the Liquidation Court has purportedly exercised *in rem* jurisdiction over Mission's assets; a ruling by this Court would definitely result in piecemeal adjudication of the Mission Liquidation; and the state forum (and Judge Lewin in particular) has been wrestling with this case for the past two years, developing an unmatched expertise in this reinsurance dispute. Moreover, the Commissioner contends that the facts of *Colorado River* parallel those in the case at bar. Specifically, in *Colorado River* the federal court, pursuant to the McCarran Amendment,[13] gave deference to Colorado's comprehensive "prior appropriation" scheme for adjudication of water rights. Similarly, the Commissioner urges this Court, pursuant to the McCarran-Ferguson Act,[14] to defer to California's comprehensive Insurance Code statutes governing insurance company rehabilitation and liquidation.

Allstate responds first by observing that the entire doctrine is applicable only in exceptional circumstances because federal courts have an "unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River*, 96 S.Ct. at 1246. Allstate also points to *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 103 S.Ct.

[13] This amendment, codified at 43 U.S.C. § 666, gives federal consent to state jurisdiction over the United States in state court actions involving water rights.

[14] Codified at 15 U.S.C. § 1011 *et seq.*, this Act exempts insurance companies from federal regulation, placing the policing of this industry in the exclusive control of the states.



927 (1983), wherein the Supreme Court held that it was an abuse of discretion for a district court to abstain from a dispute in which a party sought to enforce its right to compel arbitration under the Federal Arbitration Act, just as Allstate seeks to do in this case.

In *Cone*, the hospital sued in state court for a declaratory judgment that it owed Mercury nothing under a contract to build a hospital addition, and that Mercury had waived its right to compel arbitration of the dispute. Mercury subsequently filed a diversity-of-citizenship action in federal district court seeking an order compelling arbitration under § 4 of the Arbitration Act. The district court stayed the federal case due to the pendency of parallel state litigation. The Supreme Court affirmed the Fourth Circuits' reversal, rejecting the "piecemeal litigation" prong of *Colorado River*:

> It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.

*Cone*, 103 S.Ct. at 939.[15]

[15] The Supreme Court also observed in *Cone* that an "important reason against allowing a [federal] stay" was the substantial doubt whether "Mercury could obtain from the state court an order compelling the Hospital to arbitrate." *Cone*, 103 S.Ct. at 942. Allstate stresses that the danger is even greater here in that the Liquidation Court has already denied one party's motion to compel arbitration under a similar reinsurance contract.

*Cone* may be distinguished from this case on several grounds. First, the public policy interest involved here—insurance regulation—is fundamentally more important to the state than *Cone*'s simple contract dispute. Second, the underlying dispute here is between the Commissioner and virtually hundreds of reinsurers; thus, the danger in piecemeal litigation (a *Colorado River* factor) is significantly greater here than in the three-party (Cone Hospital, Mercury Construction, and the architect) dispute of *Cone*. Third, the Liquidation Court has been addressing the Mission Companies litigation for two years and has developed considerable expertise in this area. This period is considerably longer than the 19 day difference between filings in *Cone*. "[P]riority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Cone*, 103 S.Ct. at 940.[16] Finally, here the state court has at least a colorable claim to *in rem* jurisdiction over the Mission Company assets. This *Colorado River* factor was clearly absent in *Cone*.

Although *Cone* is distinguishable from the instant action, and despite the fact that the *Colorado River* factors militate in favor of abstention, the Court finds that this doctrine is inapplicable to the instant action. As Allstate accurately observes, *Colorado River* applies only to concurrent litigation. In *FDIC v. Nichols*, 885 F.2d 633, (9th Cir. 1989), the Ninth Circuit expressly observed that *Colorado River* abstention is available "only 'in situations involving the *contemporaneous* exercise of concurrent jurisdictions, either by the federal courts or by state and federal courts.'" *Nichols*, 885 F.2d at 638 (quotation omitted) (emphasis in original). Here concurrence is lacking because Allstate—depending on the outcome of this motion—will be in either state or federal court,

[16] The Court acknowledges that this point is weakened by the fact that Allstate has been a party to the Mission litigation only since February of 1990.



but not both. Therefore, the Court finds that Allstate is not subject to this abstention doctrine.

In so holding, the Court acknowledges that this distinction benefits defendants like Allstate who, rather than file a separate, diversity-based motion to compel arbitration, first remove themselves from the state proceeding and then seek arbitration. While hesitant to base decisions on procedural technicalities, the Court finds the law concerning this doctrine clear. The *Colorado River* abstention doctrine is based on a "wise judicial administration" philosophy aimed at avoiding duplicative litigation. Here, the doctrine is not implicated because there is no concurrent state action to which Allstate is a party; thus, there is less risk of duplication.

C. *Abstention is Warranted Under Burford*

Under *Burford v. Sun Oil Co.*, 63 S.Ct. 1098 (1943), a federal court may abstain from a case where its disposition of the matter would disrupt an important state policy. *Id.* at 1105-08. In *Burford*, the district court abstained from reviewing the validity of an order issued by the Texas Railway Commission allowing Burford to drill four oil wells. The Commission had been given broad discretion to regulate the state's oil and natural gas resources, and the State had established an elaborate review system for regulating this industry.

The Commissioner contends that California has enacted a comprehensive scheme to regulate the business of insurance, and it is this statutory scheme that vests control of the Mission Companies exclusively in the Liquidation Court. This control extends to the Commissioner in his capacity as rehabilitator or receiver. In short, the complex statutes of the *California Insurance Code*, Sections 1010 *et seq.*, are intended to prevent interference with the insolvency proceeding.[17] Deference to the Liquidation

[17] The Commissioner quotes from § 1020 which provides:

Court's jurisdiction will allow what has been an orderly liquidation of the Mission Companies to proceed undisturbed.

The Commissioner points to a host of insurance cases where the court declined to exercise jurisdiction based on the *Burford* abstention doctrine. In particular, plaintiff emphasizes: *Grimes v. Crown Life Insurance Company*, 857 F.2d 699 (10th Cir. 1988) *cert. denied*, 109 S.Ct. 1568 (1989); *Corcoran v. Universal Reinsurance Corp.*, 713 F. Supp. 77 (S.D.N.Y. 1989) ("*Corcoran*"); and *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31 (2nd Cir. 1988) ("*Ardra*").

In *Grimes*, The Oklahoma Insurance Commissioner, as liquidator of an insolvent insurer, filed a declaratory relief action seeking to establish rights under a reinsurance agreement between the liquidated insurer and Crown Life. Crown removed the case from state court on the basis of diversity jurisdiction, and the Commissioner appealed. The Tenth Circuit, following the *Burford* abstention doctrine, held that the district court should not have heard the action. *Grimes*, 857 F.2d at 706.

The fundamental question in *Grimes*—whether the reinsurance contract complied with the requirements of an Oklahoma statute so as to require the reinsurer to bear the risk for the primary insurer's insolvency—was one "of state law which affect[s] the fundamental purposes of a state liquidation proceeding." *Id.* at 705. The interpretation of this statutory provision would impact on the

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Upon the issuance of an order either under Section 1011 or 1016, or at any time thereafter, the court shall issue such other injunctions or orders as may be deemed necessary to prevent any or all of the following occurrences:

(a) Interference with the Commissioner or the proceeding.

(b) Waste of assets of such person.

(c) The institution or prosecution of any actions or proceedings . . .



Commissioner's power to collect on reinsurance agreements entered into by a liquidated company. Such a ruling by any court would greatly affect an important state right; namely, the state's ability to administer a comprehensive insurance regulatory scheme. This same important state interest would be affected if this Court were to rule on Allstate's motion.

The *Grimes* court also noted that interpretation of the Oklahoma statute might require a ruling on another important matter of state law—the reinsurer's ability to reduce any monies owed through a set-off. *Id.* at 706. A major issue in the Commissioner's suit against Allstate (indeed against all the reinsurers) will be the availability of set-offs for the reinsurers. This fact also militates toward remand.

In *Ardra*, New York's Superintendent of Insurance, as liquidator of an insolvent insurer, filed suit in state court against a Bermuda reinsurer and two of its officers. The reinsurer removed and sought an order compelling arbitration, exactly as Allstate has done here. The district court granted the motion to remand, and the Second Circuit approved, finding no abuse of discretion. *Ardra*, 842 F.2d at 37. Specifically, abstention was appropriate in that it accommodated values of judicial economy and comity. *Id.* at 36. The district court noted the importance of state regulation of the insurance industry, and abstained because the suit presented a "novel" issue of state law; namely, the scope of the Superintendent's power to collect on reinsurance agreements entered into by a liquidated company. *Id.* at 37. The Commissioner asserts that the novel issue presented here is the scope of the reinsurers' offset rights.

Finally, in *Corcoran v. Universal Reinsurance Corp.*, 713 F. Supp. 77 (S.D.N.Y. 1989), the Superintendent of Insurance, as Liquidator of the Dominion Insurance Company, brought suit in state court against defendant URC

for monies due under a retrocession agreement.[18] URC raised defenses of set-off and recoupment and petitioned for removal based on diversity. The liquidator moved to remand, arguing that federal jurisdiction was precluded by the McCarran-Ferguson Act and *Burford* abstention principles.

The Court stated that *Burford* abstention is mandated where "the state has a particular interest in a subject of regulation and has devised a unified scheme to deal with that interest." *Corcoran*, 713 F. Supp. at 79. The court further found that to permit a party to evade the state liquidation proceedings by removing an action would encourage other parties to disrupt such a comprehensive adjudicatory scheme, and that it was precisely this type of result the Burford rule was designed to prevent. *Id.* at 79-80.

Initially, Allstate counters that these insurance-abstention decisions, based on the autonomy given state insurance regulators under McCarran-Ferguson, are inapposite because the Ninth Circuit has held that the McCarran-Ferguson Act is inapplicable to state insurance liquidation statutes.

In *State of Idaho ex rel. Soward v. United States*, 858 F.2d 445, 452-53 (9th Cir. 1988), the 9th Circuit stated:

> Once rendered insolvent and placed in the hands of a liquidator, an insurance company no longer is involved in risk protection. . . In such a situation, the state is no longer regulating the traditional business of insurance, and thus, has exceeded the boundaries within which the McCarran-Ferguson Act frees it from preemption by general federal statutes.

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[18] A retrocession agreement is the contract between a reinsurer and its retrocessionaire. It is the reinsurance of reinsurance.



The holding in *Soward*, however, was that a federal insolvency statute superseded the state's liquidation framework so as to give the IRS a priority over other creditors of insolvent insurers. While it is true, as Allstate points out, that the Ninth Circuit declared that liquidation proceedings do not constitute the "business of insurance" so as to warrant complete state autonomy under McCarran-Ferguson, this declaration was made in the context of protecting a Constitutionally mandated federal right (i.e. the right to tax). "The enforcement of tax obligations pursuant to Article I § 8 of the Constitution represents a . . . compelling federal regulatory interest that militates against the diminution or supersession of federal authority." *Soward*, 858 F.2d at 451. The right to compel arbitration, while a valid interest, hardly rises to the Constitutional level as the right to tax found in *Soward*.[19]

Thus, even if *Soward* is taken at face value, that preemption-based holding would not preclude abstention under *Burford* in this case. In *Lac D'Amiante du Quebec v. American Home Assurance Co.*, 864 F.2d 1033 (3d Cir. 1988), the Third Circuit acknowledged the finding in *Soward* and then stated:

> [i]n the case at bar, however, we are not wrestling with the question of whether a federal statute is preempted by the provision of McCarran-Ferguson stating that federal statutes may not impair the operation

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[19] Moreover, the Federal insolvency statute was directly at odds with Idaho's creditor priority scheme. In such instances, the Supremacy Clause often dictates that federal law shall prevail. Here, the conflict between California's liquidation scheme and the Federal Arbitration Act is not nearly so direct.

In *Soward*, the IRS persuasively argued that Congress could not have intended to allow states to redefine the taxes owed to the Federal government under the auspices of McCarran-Ferguson. It is similarly doubtful whether Congress, through the Arbitration Act, intended to undermine a state's ability to orderly administer the important state function of insurance regulation.

> of state statutes regulating the business of insurance. Rather we must decide whether a federal court properly declined to abstain in favor of the state scheme. The McCarran-Ferguson Act seems relevant to this inquiry even if we are unconvinced that the Act preempts the federal statute extending diversity jurisdiction to the federal courts when it impairs a state liquidation proceeding. Reliance on McCarran-Ferguson in the abstention context thus does not require us to discern whether state regulation of insurer insolvencies constitutes regulation of the business of insurance for other purposes.

*D'Amiante*, 864 F.2d at 1039[20] Thus, *Soward*'s depiction of the 'business of insurance' in a preemption dispute does not necessarily resolve this abstention issue.

Allstate, relying primarily on *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 109 S.Ct. 2506 (1989) ("*NOPSI*"), also argues that the Supreme Court has drastically narrowed the reach of the *Burford* abstention doctrine in two important respects which make its applicability to the instant action improper. First, Allstate argues that under *NOPSI*, *Burford* applies only to federal district courts acting in equity, not when the action is for legal damages as is the case here. Second, Allstate avers that abstention applies only when a federal ruling would disrupt a state administrative proceeding or order, and not a judicial action as is the case here.

To support this restrictive view of *Burford*, Allstate quotes a passage from *NOPSI* where the Supreme Court described the *Burford* abstention doctrine as follows:

> Where timely and adequate state court review is available, a federal court *sitting in equity* must decline to interfere with the *proceedings or orders of*

[20] The Court cites to *D'Amiante* notwithstanding the Third Circuit's subsequent retreat from this case in *University of Maryland*, discussed *infra*.



> *state administrative agencies*: (1) where there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

*NOPSI*, 109 S.Ct. at 2514 (emphasis added) (quoting *Colorado River Water Conservation Dist. v. United States*, 96 S.Ct. 1236, 1245 (1976).

The Supreme Court further observed that *Burford* is concerned with "protecting state administrative processes from undue federal interference, and does not require abstention whenever there exists such a process, or even in all cases where there is a potential for conflict with state regulatory law or policy." *NOPSI*, 109 S.Ct. at 2514.

*NOPSI*'s limitation of *Burford* to equitable actions, Allstate asserts, is no accident because it was in such actions that the doctrine originated; moreover, the potential for some direct affront to a state proceeding or policy is much greater in an equitable action. The Court is not prepared to curtail the scope of *Burford* as drastically as Allstate would have it.

In *NOPSI*, the Federal Energy Regulatory Commission (FERC) allocated the cost of a nuclear reactor among several companies, including petitioner New Orleans Public Service, Inc. (NOPSI). NOPSI, which provides retail electrical service to New Orleans, then sought, from respondent New Orleans City Council, a rate increase to cover the increase in its wholesale rates resulting from the FERC's allocation of the nuclear reactor costs. The Council determined that the allocation costs should not

be completely reimbursed through a rate increase because NOPSI was negligent in failing to diversify its supply portfolio. NOPSI then filed a state suit challenging the ratemaking order of the City Council. NOPSI also filed a federal action seeking to declare that the order was preempted by federal law under a Supreme Court case [21] which held that, for purposes of setting intrastate retail rates, a state may not differ from FERC's allocation of wholesale power by imposing its own judgment. The district court abstained from hearing the case on both the *Burford* and *Younger* doctrines, and the Fifth Circuit affirmed.

The Supreme Court reversed. The Court first restated the general rule that federal courts should not abdicate their authority in the absence of exceptional circumstances. One recognized exception is the *Burford* abstention doctrine; however, it was inapplicable in *NOPSI* because:

> NOPSI's primary claim is that the Council is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs. Unlike a claim that the state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of 'an essentially local problem.'

*NOPSI*, at 2515-15 (citations omitted).

In short, *NOPSI* found *Burford* inapplicable because the district court there needed only to inquire into the "four corners of the Council's retail rate order . . . to determine whether it is facially pre-empted by FERC's allocative decree and relevant provisions of the Federal

[21] *Nantahala Power & Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986).



Power Act . . . [and] would not unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity." *Id.* at 2515.

This traditional interpretation of the *Burford* doctrine in *NOPSI* does not mandate that *Burford* be rejected here where a federal ruling on Allstate's case would risk inconsistent adjudications on important state issues such as a reinsurer's right to a set-off. This certainly would undermine a state's interest in uniform insurance laws and unfragmented liquidation proceedings.

Allstate also cites *University of Maryland at Baltimore v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991), as support for its assertion that *Burford* applies only in equitable actions which affect an administrative proceeding. In *University of Maryland*, the Third Circuit rejected *Burford* abstention in a case where policyholders of an insolvent insurer brought an action against the auditor of the insurer's books. The court's ruling, according to Allstate, was based in part on the ground that: "Here, unlike *Burford* and the other Supreme Court cases involving *Burford* doctrine, the action was at law, not in equity, and sought money damages." *University of Maryland*, 923 F.2d at 271.

Allstate overstates the import of this language. The Third Circuit in *University of Maryland* found *Burford* inapplicable because that doctrine:

> "may be ordered in insurer insolvency cases only when one of the parties to the action in which the federal court abstains is the insolvent insurer or its receiver, trustee, officers, and the like. Here, by contrast, the defendant is PMM—a third party that does not fall into any of these categories. . . This third party's connection to the state regulatory mechanism (governing insolvency proceedings) *that Burford absention is designed to protect*, is simply too attenuated to justify renunciation of a federal court's obligation to exercise the jurisdiction granted to it by Congress.

*University of Maryland*, 923 F.2d at 271 (emphasis added). Thus, this case actually acknowledges that *Burford* was designed to protect cases where a receiver/liquidator is a party to a federal suit which might impinge on the state's uniform regulatory scheme. The present action is just a case.

In addition, the *University of Maryland* court discussed whether *NOPSI* narrowed *Burford*'s applicability to federal courts acting in equity:

> the Supreme Court stated, admittedly in dictum, that, *Burford* abstention applies to "a federal court sitting *in equity*." Without reading too much into this dictum, we believe, as noted below, that *NOPSI* generally cautions lower federal courts not to extend *Burford* abstention proper grounds.

*University of Maryland*, 923 F.2d at 271 (emphasis in original) (citations omitted).

To be sure, *NOPSI* raises the equity-law distinction, and the Third Circuit in *University of Maryland* discusses it and apparently finds validity in this dichotomy. The ultimate holding in *University of Maryland*, however, applies *Burford* in a traditional manner and construes *NOPSI* as an admonition to the courts to guard against extending *Burford* beyond its proper confines. To date, abstention in insurance cases which threaten the uniform implementation of state insurance regulations, such as the case at bar, have regularly been accepted as within the scope of the *Burford* doctrine. *See, e.g., Ardra* and *Grimes, supra*, and *Holley v. Great American Life Ins. Co.*, 101 F.2d 172, 176 (8th Cir. 1939), *cert. denied*, 307 U.S. 615. Notwithstanding defendant's well-presented arguments to the contrary, the Court finds that *Burford* warrants abstention here.[22]

[22] The Commissioner also suggests that the state court liquidation proceedings are equitable in nature because they will determine who receives the Mission *res*; thus, even accepting the argument that *NOPSI* restricts *Burford* to courts acting in equity, the Court should still abstain here. While not accepting this characterization of the Superior Court proceedings, the Court does acknowledge that those proceedings are integral to the statutorily-prescribed liquidation process. As such, it should not be fragmented lest California's interest in an orderly liquidation of the Mission companies be undermined. The Court also observes that the liquidation court can be seen as a special court whose existence militates toward abstention. *See, Kirkbride v. Continental Casualty Co.*, 91 D.A.R. 5524, 5525 (9th Cir. May 14, 1991).



Finally, Allstate suggests that even if *Burford* abstention were applicable, the Court should stay this action pending a California Supreme Court ruling on the controversial issue of state law: whether reinsurers are entitled under the California Insurance Code to set-off reinsurance balances due it from Mission against monies claimed by the Commissioner.[23] Allstate contends that once California's highest court rules on this matter, subsequent tribunals will simply have to apply it. In light of a district court's obligation to exercise its jurisdiction, Allstate believes that a stay is more appropriate than an outright remand.

The Commissioner accurately responds that other federal courts, when considering analogous situations, have remanded the matter to state court after finding abstention to be appropriate. *See, Grimes, supra*; and *Ardra, supra*. In addition, it is not clear what will be left to adjudicate when and if the California Supreme Court rules on the set-off issue. Therefore, to state that no risk of inconsistent rulings would remain should the Court stay this matter appears to be speculation. Rather than engage in such guess work, the Court chooses to remand this matter to state court, pursuant to *Burford*, where an orderly and comprehensive liquidation of the Mission Companies may be completed.

[23] This set off issue is apparently before the California Supreme Court.

## III. SUMMARY AND CONCLUSIONS

California has an overriding interest in regulating insurance insolvencies and liquidations in a uniform and orderly manner. If the Court were to adjudicate the Commissioner's reinsurance dispute with Allstate, and specifically the hotly contested set-off issue, then this important state interest could be undermined by inconsistent rulings from the federal and state courts.

There is ample precedent supporting the application of *Burford* to insurance cases such as this, and the Court takes guidance from these decisions. In so ruling, the Court refuses to adopt Allstate's interpretation of *NOPSI* which would limit *Burford* to federal courts acting in equity. Although the Supreme Court in *NOPSI* referred to *Burford* in the equity context, the Court believes the crux of *NOPSI* was to caution lower federal courts against an expansion of this abstention doctrine. As demonstrated above, it is precisely in this area—state regulation of insurance proceedings—that *Burford* has been found applicable. Therefore, the Court holds that *Burford* abstention is appropriate here, and the Commissioner's motion to remand this action to state court is granted.

DATED: July 1, 1991

s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge



**APPENDIX C**

[Filed May 19, 1995]

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 91-55855

JOHN GARAMENDI, Insurance Commissioner of the State of California, in his capacity as Liquidator of MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, HOLLAND-AMERICA INSURANCE COMPANY AND MISSION REINSURANCE CORPORATION, as successor to ROXANI GILLESPIE, Insurance Commissioner of the State of California, in her capacity as Liquidator of MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, HOLLAND-AMERICA INSURANCE COMPANY AND MISSION REINSURANCE CORPORATION,
*Plaintiff-Appellee,*

v.

ALLSTATE INSURANCE COMPANY,
*Defendant-Appellant,*

and

INSURANCE COMPANY OF NORTH AMERICA,
*Defendant.*

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ORDER

Before: FLETCHER, PREGERSON, and NORRIS, Circuit Judges

In our opinion we held that the abstention doctrine developed in *Burford v. Sun Oil*, 319 U.S. 315 (1943), does not apply to cases in which the plaintiff seeks solely legal relief. In its petition for rehearing, the Commissioner argues, for the first time, that the underlying complaint seeks more than simple legal relief because it includes a request for a declaration that the defendants owe the Commissioner the amounts he seeks in his breach of contract claim. In response, Allstate argues that "[d]eclaratory relief is neither strictly equitable nor legal . . . . A particular declaratory judgment draws its equitable or legal substance from the nature of the underlying controversy." *Transamerica Occidental Life Ins. Co. v. Digregorio*, 811 F.2d 1249, 1251 (9th Cir. 1987). It is Allstate's position that in this case, the nature of the underlying controversy to enforce a reinsurance agreement makes the declaratory relief requested clearly legal.

We do not address this argument because the Commissioner waived it by failing to raise it prior to his petition for rehearing. "Ordinarly, arguments not timely presented are deemed waived. . . . This general doctrine of waiver applies to arguments raised for the first time in a petition for rehearing." *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992) (citing *United States v. Lewis*, 798 F.2d 1250, 1250 (9th Cir. 1986)). In this case, Allstate clearly argued on appeal that the *Burford* abstention doctrine was inapplicable to suits seeking solely legal relief and that the complaint in this case was properly characterized as a suit at law for money damages. In response, the Commissioner chose to limit his response to arguing that the *Burford* abstention doctrine was applicable to suits seeking only legal relief. He did not argue that his complaint was properly characterized as seeking both legal and equitable relief.

We further reject the Commissioner's other arguments for rehearing this case.



The panel has voted unanimously to deny the petition for rehearing. Judges Fletcher and Pregerson vote to reject the suggestion for rehearing en banc and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

## APPENDIX D

## STATUTES INVOLVED

The McCarran-Ferguson Act, codified at 15 U.S.C. §§ 1011-1015, provides as follows:

### § 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

### § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

### § 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Antitrust Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of



October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

### § 1014. Applicability of National Labor Relations Act and Fair Labor Standards Act of 1938

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

### § 1015. Definition of "State"

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

The pertinent provisions of the California Insurance Code, codified as Cal. Ins. Code §§ 900-900.2, 900.9, 903-903.5, 905-911, 922.1-923.5, 925, 925.2, 925.4, 1010-1042, 1056.5-1064.12, provide as follows:

## ARTICLE 10. FINANCIAL STATEMENTS OF INSURERS

### § 900. Annual filing

On or before the first day of March of each year every insurer doing business in this State shall make and file with the commissioner, in triplicate, statements exhibiting

its condition and affairs as of the thirty-first day of December then next preceding.

### § 900.2. Annual audit

(a) All insurers doing business in this state shall have an annual audit by an independent certified public accountant. The audit shall be conducted and the audit report prepared and filed in conformity with the Annual Audited Financial Reports instructions contained in the annual statement instructions as adopted from time to time by the National Association of Insurance Commissioners.

(b) The commissioner may grant a 30-day extension of the filing date upon a showing by the insurer and its independent certified public accountant of the reasons for requesting that extension and the determination by the commissioner of substantal cause for an extension. The request for an extension shall be submitted in writing not less than 20 days prior to the due date in sufficient detail to permit the commissioner to make an informed decision on the requested extension.

(c) The commissioner may promulgate regulations to further the purposes of this section.

### § 900.9. Officer or employee signing or filing false report or statement; punishment

Any officer, director, employee or agent of any insurer, who wilfully signs or files a false or untrue report or statement of the business, affairs, or condition of such insurer with intent to deceive any public officer, office, or board to which such insurer is required by law to report, or which has authority by law to examine into its affairs or transactions, is guilty of a felony.

### § 903. Verification of statements

The commissioner shall require statements and reports to be verified as follows: (a) If made by a domestic corporation, by the oaths of any two of the executive



officers thereof. (b) If made by an individual or firm, by the oath of such individual or a member of the firm. (c) If made by a foreign insurer, by the oath of the principal executive officer thereof, or manager, residing within the United States.

### § 903.5. Affidavit of officers

In any case where an insurer is required by law to file with the commissioner statements or reports respecting its financial condition, income or disbursements, verified or signed by its designated officers, agents, or employees, the commissioner may accept and file the statement or report verified by affidavit of the president or vice president and the treasurer or secretary of such insurer, in lieu of the verification or signature otherwise prescribed by law.

### § 905. Statement of insurer other than life

Such statement, if made by other than a life insurer, shall show the following matters relating to its condition and affairs.

### § 906. Capital stock; paid-in capital

First—Such statement shall show (a) in the case of an incorporated insurer having a capital stock, the amount of its capital stock, or (b) in any other case, the amount of the insurer's paid-in capital.

### § 907. Assets

Second—Such statement shall also show the property or assets held by the insurer, specifying:

(1) The value of real property held by it.

(2) The amount of cash on hand and deposited in banks to its credit.

(3) The amount of cash in the hands of agents, and in course of transmission.

(4) The amount of loans secured by mortgages which are a first lien on real property, on which there is less than one year's interest due or owing.

(5) The amount of loans on which interest has not been paid within one year previous to such statement.

(6) The amount due the insurer upon which judgments have been obtained.

(7) The amount of bonds of this State, of the United States, or any incorporated city of this State, and of any stocks and other bonds owned by the insurer, specifying the amount, number of shares, and par and market value of each kind of bond or stock.

(8) The amount of stocks and bonds held as collateral security for loans, with the amount loaned on each kind of stock or bond, its par value and its market value.

(9) The amount of unpaid interest due, and of unpaid interest accrued but not yet due.

(10) The amount of all other loans made by the insurer, specifying the same.

(11) The amount of premium notes on hand on which policies are issued.

(12) All other assets belonging to the insurer, specifying each.

**§ 908. Liabilities**

Third—Such statement shall also show the liabilities of the insurer, specifying:

(1) The amount of losses due and unpaid.

(2) The amount of claims for losses resisted by the insurer.

(3) The amount of losses in process of adjustment or in suspense, including all reported or supposed losses.



(4) The amount of dividends declared, due, and remaining unpaid.

(5) The amount of dividends declared, but not due.

(6) The amount of money borrowed and security given for the payment thereof.

(7) Gross premiums, without any deductions, received and receivable upon all unexpired risks, reinsurance thereon pro rata.

(8) Amount reclaimable by the insured on perpetual fire insurance policies, being 95 percent of the premiums or deposit received.

(9) Reinsurance fund and all other liabilities, except capital.

(10) Unused balances of bills and notes taken in advance for premiums on open marine and inland policies, or otherwise, returnable on settlement.

(11) Principal unpaid on script or certificates of profits, which have been authorized or ordered to be redeemed.

(12) Amount of all other liabilities of the company, specifying each liability.

**§ 909. Income**

Fourth—Such statement shall also show the income of the company during the preceding year, specifying:

(1) Cash premiums received.

(2) Notes received from premiums.

(3) Interest money received, specifying the source.

(4) Income received from all other sources, specifying the source.

**§ 910. Expenditures**

Fifth—Such statement shall also show the expenditures of the preceding year, specifying:

(1) The amount of losses paid.

(2) The amount of dividends paid.

(3) The amount of expenses paid, including commissions and fees to agents and officers of the insurer.

(4) The amount paid for taxes.

(5) The amount of all other payments and expenditures.

**§ 911. Premiums**

Sixth—Such statement shall also show the amount of premiums on insurance on subject matter in this State.

**§ 922.1. Deductions from liabilities; reinsured risks other than life insurance risks**

Subject to the limitations contained in Sections 922.2 to 922.8, inclusive, the following deductions may be made from the liabilities required to be shown by this article for risks other than life insurance risks in the event that the whole or any portion of the risks insured by an insurer has been reinsured by another insurer:

(a) The amounts recoverable by the insurer from such reinsurer for losses due and unpaid, for claims for losses resisted by the insurer and for losses in process of adjustment or in suspense including all reported or supposed losses.

(b) The ratable portion of the gross unearned premium on the risks so reinsured except in the case of excess loss and catastrophe reinsurance where the deduction shall be on the basis of the actual reinsurance premiums and actual reinsurance terms.



**§ 922.15. Nonadmitted insurers; deductions from liabilities; reinsured life insurance risks**

Subject to the limitations contained in Section 922.2, 922.3, 922.6 and 922.8 with respect to admitted insurers and in Sections 922.2 to 922.6, inclusive, and 922.8 with respect to nonadmitted insurers the following deductions may be made from the liabilities required to be shown by this article for life insurance risks in the event that the whole or any portion of the risk insured by an insurer has been reinsured by another insurer;

(a) The amounts recoverable by the insurer from such reinsurer for:

(1) Claims for death losses and matured endowments due and unpaid,

(2) Claims for death losses and matured endowments in process of adjustment or adjusted and not due,

(3) Claims resisted by the insurer, and

(4) Amounts due and unpaid on annuity claims.

(b) The ratable portion of:

(1) Trust funds on deposit or the net present value of all outstanding policies computed on the standards provided in Section 986, and Articles 3 (commencing with Section 10478) and 3a (commencing with Section 10489.1) of Chapter 5, Part 2, Division 2.

(2) Additional trust funds on deposit, or net present value of extra and special risks, including those on impaired lives.

(3) Amount of all unpaid dividends of surplus percentage, bonuses and other description of profits to policyholders, and interest thereon, and

(4) Amount of any other liability to policyholders or annuitants not included in this section.

In the case of excess loss and catastrophe reinsurance the deduction permitted by this subdivision (b) shall be solely on the basis of the actual reinsurance premiums and actual reinsurance terms.

### § 922.2. Requirements of reinsurance contract

No such deductions specified in Sections 922.1 and 922.15 shall be made or allowed unless the contract of reinsurance contains provision in substance as follows:

The portion of any risk or obligation assumed by the reinsurer, when such portion is ascertained, shall be payable on demand of the ceding insurer at the same time as the ceding insurer shall pay its net retained portion of such risk or obligation, with reasonable provision for verification before payment, and the reinsurance shall be payable by the reinsurer, on the basis of the liability of the ceding insurer under the contract or contracts reinsured without diminution because of the insolvency of the ceding insurer. In the event of insolvency and the appointment of a conservator, liquidator or statutory successor of the ceding company, such portion shall be payable to such conservator, liquidator or statutory successor immediately upon demand, with reasonable provision for verification, on the basis of claims allowed against the insolvent company by any court of competent jurisdiction or by any conservator, liquidator, or statutory successor of the company having authority to allow such claims, without diminution because of such insolvency or because such conservator, liquidator or statutory successor has failed to pay all or a portion of any claims. Payments by the reinsurer as above set forth shall be made directly to the ceding insurer or to its conservator, liquidator or statutory successor, except where the contract of insurance or reinsurance specifically provides another payee of such reinsurance in the event of the insolvency of the ceding insurer.

The reinsurance agreements may provide that the conservator, liquidator or statutory successor of a ceding



insurer shall give written notice of the pendency of a claim against the ceding insurer indicating the policy or bond reinsured, within a reasonable time after such claim is filed and the reinsurer may interpose, at its own expense, in the proceeding where such claim is to be adjudicated, any defense or defenses which it may deem available to the ceding company or its conservator, liquidator or statutory successor. The expense thus incurred by the reinsurer shall be payable subject to court approval out of the estate of the insolvent ceding insurer as part of the expense of conservation or liquidation to the extent of a proportionate share of the benefit which may accrue to the ceding insurer in conservation or liquidation, solely as a result of the defense undertaken by the reinsurer.

The original insured or policyholder shall not have any rights against the reinsurer which are not specifically set forth in the contract of reinsurance, or in a specific agreement between the reinsurer and the original insured or policyholder.

### § 922.3. Reinsurer's undertaking

No such deductions specified in Sections 922.1 and 922.15, nor any credit whatsoever, shall be allowed in any accounting or financial statement of the ceding insurer in respect to any so-called reinsurance contract unless, in such contract, the reinsurer undertakes to indemnify the ceding insurer, not only in form but in fact, against all or a part of the loss or liability arising out of the original insurance.

### § 922.4. Credit in accounting and financial statements; reinsurance ceded to nonadmitted reinsurer; conditions

Credit in accounting and financial statements on account of reinsurance ceded to a nonadmitted reinsurer other than an alien reinsurer shall be allowed only:

(a) Where it is demonstrated by the ceding insurer to the satisfaction of the commissioner that the reinsurer maintains the standards and meets the financial requirements applicable to an admitted insurer and that it will submit itself to the jurisdiction of the courts of this state, or a court of competent jurisdiction in any state of the United States and designate the commissioner or a designated attorney in this state as its agent for service of process in this state in any action, suit, or proceeding instituted by or on behalf of the ceding insurer for any matter arising out of the reinsurance, or

(b) To the extent of deposits by, or funds withheld from, the reinsurer pursuant to express provision therefor in the reinsurance contract as security for the payment of the obligations thereunder if the deposits or funds are held subject to withdrawal by, and under the control of, the ceding insurer or are placed in trust for those purposes in a qualified United States financial institution if withdrawals from the trust cannot be made without the consent of the ceding insurer. With respect to credit life insurance and credit disability insurance, the deposits or funds shall be deposited in a bank located in California, notwithstanding the fact that the deposits or funds are held subject to withdrawal by, and under the control of, the ceding insurer. For purposes of this subdivision, "qualified United States financial institution" means an institution that (1) is organized, or in the case of a United States Branch or agency office of a foreign banking organization is licensed, under the laws of the United States or any state thereof and has been granted authority to operate with fiduciary powers, (2) is regulated, supervised, and examined by federal or state authorities having regulatory authority over banks and trust companies, and (3) is insured by the Bank Insurance Fund of the Federal Deposit Insurance Corporation.

(c) To the extent that the amount of a clean and irrevocable letter of credit issued for a term of one year



conforming to the requirements set forth below, is a substitute for advances for claims, unearned premium, and all other policy and contract liabilities and reserve obligations to be made by a foreign reinsurer in connection with its liability under a specific reinsurance agreement. The clean and irrevocable letter of credit shall be issued and maintained under arrangements satisfactory to the commissioner as constituting security to the ceding insurer substantially equal to that of a deposit under subdivision (b), and that it shall be (1) issued or confirmed by a banking institution which is a member of the Federal Reserve System and of financial standing satisfactory to the commissioner, (2) issued by a California state chartered bank which is insured by the Federal Deposit Insurance Corporation and meets the conditions established by the commissioner, or (3) issued or confirmed by a United States office of a foreign banking corporation that is (A) licensed under the laws of the United States or any state thereof, (B) regulated, supervised, and examined by an agency of the United States or a state agency having regulatory authority with respect to banks and trust companies, (C) designated by the Securities Valuation Office of the National Association of Insurance Commissioners as meeting its credit standards for issuing or confirming letters of credit, and (D) of a financial standing that is satisfactory to the Commissioner. For purposes of this subdivision, a confirming bank undertakes the identical terms and obligations of the issuer including those set forth herein. The changes enacted to this subdivision at the 1982 Regular Session shall apply only to life insurers.

As used in this section, the terms "deposits" and "funds" include securities authorized as general investments by Article 3 (commencing with Section 1170) of Chapter 2, but not to exceed current market value.

## § 922.5. Credit in accounting and financial statements; reinsurance ceded to alien reinsurer; trust fund; conditions

Credit in accounting and financial statement permitted by this code on account of reinsurance ceded to an alien reinsurer other than one which complies with Article 2 (commencing with Section 1580) of Chapter 4 and includes in the statements required by that article all reserves and liabilities arising out of that reinsurance shall be allowed only:

(a) To the extent of the amount of deposits by, and funds withheld from, the alien reinsurer pursuant to express provision therefor in the reinsurance contract as security for the payment of the obligations thereunder if the deposits or funds are held subject to withdrawal by, and under the control of, the ceding insurer or are placed in trust for those purposes in a qualified United States financial institution, if withdrawals from the trust cannot be made without the consent of the ceding insurer. For purposes of this subdivision, "qualified United States financial institution" means an institution that (1) is organized, or in the case of a United States branch or agency office of a foreign banking organization is licensed, under the laws of the United States or any state thereof and has been granted authority to operate with fiduciary powers, (2) is regulated, supervised, and examined by federal or state authorities having regulatory authority over banks and trust companies, and (3) is insured by the Bank Insurance Fund of the Federal Deposit Insurance Corporation.

(b)(1) Where the alien reinsurer maintains sufficient assets in the United States for the protection of policyholders in the United States and operates its business in a manner which satisfies the commissioner that it maintains standard and financial conditions reasonably comparable to those required of admitted insurers and that it is able to pay losses in the United States and that it



will submit itself to the jurisdiction of the courts of this state, or a court of competent jurisdiction in any state of the United States and designate the commissioner or a designated attorney in this state as its agent for service of process in this state in any action, suit, or proceeding instituted by or on behalf of the ceding insurer for any matter arising out of the reinsurance.

(2) Where it has been demonstrated by any ceding insurer to the satisfaction of the commissioner that the alien reinsurer is a group including incorporated and individual unincorporated underwriters that maintains a trusteed account representing the group's liabilities and attributable to business written in the United States and, in addition, the group maintains a trusteed surplus of which one hundred million dollars ($100,000,000) shall be held jointly for the benefit of United States ceding insurers of any members of the group, the commissioner shall grant accreditation to the group. The incorporated members of the group shall not be engaged in any business other than underwriting as a member of the group and shall be subject to the same level of solvency regulation and control by the group's domiciliary regulator as are the unincorporated members. The group shall make available to the commissioner an annual certification of the solvency of each underwriter by the group's domiciliary regulator and its independent public accountants.

(c) To the extent that the amount of a clean and irrevocable letter of credit issued for a term of one year conforming to the requirements set forth below, is a substitute for advances for claims, unearned premium, and all other policy and contract liabilities and reserve obligations to be made by an alien reinsurer in connection with its liability under a specific reinsurance agreement. The clean and irrevocable letter of credit shall be issued and maintained under arrangements satisfactory to the commissioner as constituting security to the ceding insurer substantially equal to that of a deposit under

subdivision (a), and that it shall be (1) issued or confirmed by a banking institution which is a member of the Federal Reserve System and of financial standing satisfactory to the commissioner, (2) issued by a California state chartered bank which is insured by the Bank Insurance Fund of the Federal Deposit Insurance Corporation and meets the conditions established by the commissioner, or (3) issued by or confirmed a United States office of a foreign banking corporation that is (A) licensed under the laws of the United States or any state thereof, (B) regulated, supervised, and examined by an agency of the United States or a state agency having regulatory authority with respect to banks and trust companies, (C) designated by the Securities Valuation office of the National Association of Insurance Commissioners as meeting its credit standards for issuing or confirming letters of credit, and (D) of a financial standing satisfactory to the commissioner. For purposes of this subdivision, a confirming bank undertakes the identical terms and obligations of the issuer including those set forth herein. The changes enacted to this subdivision at the 1982 Regular Session shall apply only to life insurers.

(d)(1) When it has been demonstrated by any ceding insurer to the satisfaction of the commissioner that the alien reinsurer is a group of incorporated insurers under common administration that maintains a trust fund in a qualified United States financial institution for the payment of the claims of its United States policyholders and ceding insurers, their assigns, and successors in interest, that has continuously transacted an insurance business outside the United States for at least three years immediately preceding the date of the financial statement for which the ceding insurer is requesting reinsurance credit, that is in good standing with its domiciliary regulator, whose individual insurer members maintain standards and financial condition reasonably comparable to admitted insurers, that submits to this state's authority to examine its books and records and bears the expense of examination, and that has an aggregate policyholder's surplus of ten billion dollars ($10,000,000,000), the commissioner shall grant accreditation to that group. The trust shall be in an amount equal to the group's several liabilities attributable to business ceded by United States ceding insurers to any member of the group pursuant to reinsurance contracts issued in the name of that group, plus the group shall maintain a joint trusteed surplus of which one hundred million dollars ($100,000,000) shall be deposited and maintained with a qualified United States financial institution, and shall be held jointly for the exclusive benefit of United States ceding insurers of any member of the group as additional security for any of those liabilities, and each member of the group shall make available to the commissioner an annual certification of the member's solvency by the member's domiciliary regulator and its independent public accountant. The group of incorporated insurers shall file with the commissioner a certified copy of the trust agreement. Each member insurer or reinsurer shall also submit to this state's authority to examine its books and records and bears the expense of examination. The commissioner shall have the authority to require additional amounts to be held in the trust as a condition for initial or continued accreditation if the commissioner determines that these additional amounts are required for the protection of ceding insurers.



(2) The group and, if the commissioner requests, any member of the group, shall report annually to the commissioner information substantially the same as that required to be reported on the National Association of Insurance Commissioners Annual Statement form by licensed insurers to enable the commissioner to determine the sufficiency of the trust fund.

(3) The trust described in paragraph (1) shall be established in a form approved by the commissioner. The trust shall remain in effect for as long as the assum-

ing insurer has outstanding obligations due under the reinsurance agreements subject to the trust. The assuming insurer or its legal successor shall not withdraw its funds from the trust without notice to the commissioner and the ceding insurer. The investments of the trust shall be limited to "general investments" and "excess investments" that would qualify as authorized investments for a California insurer.

(4) No later than February 28 of each year the trustees shall report to the commissioner in writing setting forth the balance of the trust and listing the trust's investments at the preceding year end.

(5) For purposes of this subdivision, "qualified United States financial institution" means an institution that is (A) a member of the Federal Reserve System and of financial standing satisfactory to the commissioner, (B) a California state chartered bank that is insured by the Bank Insurance Fund of the Federal Deposit Insurance Corporation and meets the conditions established by the commissioner, or (C) a United States office of a foreign banking corporation that is (i) licensed under the laws of the United States or any state thereof, (ii) regulated, supervised, and examined by an agency of the United States or a state agency having regulatory authority with respect to banks and trust companies, (iii) designated by the Securities Valuation Office of the National Asociation of Insurance Commissioners as meeting its credit standards for issuing or confirming letters of credit, and (iv) of a financial standing that is satisfactory to the commissioner.

(6) For purposes of this section, the terms "deposits" and "funds" include securities authorized as general investments by Article 3 (commencing with Section 1170) of Chapter 2, but not to exceed current market value.

(7) For purposes of this subdivision, "group of incorporated insurers" means an incorporated association of



individual incorporated assuming insurers wherein each member insured underwrites solely for its own account.

(8) "Accreditation" means the issuance of a certificate of recognition as an accredited reinsurer by the commissioner to an assuming insurer not authorized to do any insurance business in this state but which (A) presents satisfactory evidence to the commissioner that it meets the applicable standards of solvency required in this state and (B) is in compliance with the conditions prescribed by regulation under which a ceding insurer may be allowed credit for reinsurance recoverable from an insurer not authorized in this state.

(9) The group of incorporated insurers shall annually file a certified copy of this annual report by the trustee.

The commissioner shall recoup administrative cost pursuant to paragraph (1) of subdivision (a) of Section 12921.6.

### § 922.6. Deposits and funds withheld under reinsurance treaties

Deposits and funds withheld under reinsurance treaties shall be reported on the asset side of the financial statement of the ceding insurer, separately from other assets, supported by a detailed schedule describing the deposits or securities in which the withheld funds are invested, and such deposits and securities shall be valued in the same manner as if they were assets of an admitted insurer. Such schedule need not allocate such deposits or securities to the accounts of specific reinsurers or reinsurances.

### § 922.7. Contract cancellable by reinsurer

Where, under the terms of a reinsurance contract, the reinsurer is entitled to cancel such contract without the consent of the ceding insurer on less than 90 days notice,

without providing for a runoff of the reinsurance in force at the date of cancellation, credit for commission shall be allowed on the financial statement of the ceding insurer only as and to the extent that such commission is actually earned. In the case of a reinsurance contract requiring 90 or more days notice of cancellation and involving reinsurance of more than 20 percent of the ceding insurer's gross unearned premiums before any deduction for such reinsurance, the ceding insurer, within 30 days after receiving notice of cancellation, shall notify the commissioner of the fact of cancellation and the estimated amount of gross unearned premiums and return commissions involved.

### § 922.8. Losses recoverable from admitted reinsurer; allowance as assets

Losses or portions thereof paid by the ceding insurer which are recoverable from an admitted reinsurer may be allowed as assets of such ceding insurer. Losses or portions thereof paid by the ceding insurer which are recoverable from a nonadmitted reinsurer may be allowed as assets of such ceding insurer for 90 days after the payment of such losses by the ceding insurer, or for periods preceding specified settlement dates, to the extent that the ceding insurer holds the funds of or deposits made by the reinsurer or there has been a deposit in trust, conforming to the requirements of Section 922.5. With respect to reinsurance in nonadmitted reinsurers, the commissioner may disallow such assets in Sections 922.4 and 922.5.

### § 923. Annual statement forms; completion

The commissioner shall require every insurer which is required to file an annual statement to use the annual statement blanks and instructions thereto adopted by the National Association of Insurance Commissioners. The statements shall be completed in conformity with the



Accounting Practices and Procedures Manual adopted by the National Association of Insurance Commissioners, to the extent that the practices and procedures contained in the manual do not conflict with any other provision of this code. The commissioner may make changes from time to time in the form of the statements and reports as seem to him or her best adapted to elicit from the insurers a true exhibit of their condition. The commissioner shall notify each insurer of any changes from the National Association of Insurance Commissioners' annual statement blanks which the commissioner has determined pursuant to this section to be appropriate.

### § 923.5. Reserves; maintenance; computation; regulations; report of information

Each insurer transacting business in this state shall at all times maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses and claims for which the insurer may be liable, and to provide for the expense of adjustment or settlement of losses and claims.

The reserves shall be computed in accordance with regulations made from time to time by the commissioner. The promulgation of the regulations by the commissioner, or any changes thereto or amendments thereof, shall be in accordance with the procedure provided in Chapter 3.5 (commencing with Section 1340) of Part 1 of Division 3 of Title 2 of the Government Code. The commissioner shall make the regulations upon reasonable consideration of the ascertained experience and the character of such kinds of business for the purpose of adequately protecting the insured and securing the solvency of the insurer.

With respect to liability, common carrier liability, and compensation insurance, the regulations shall be consistent with Section 11558.

The commissioner may prescribe the manner and form of reporting pertinent information concerning the reserves provided for in this section.

This section shall not apply to life insurance, title insurance, disability insurance, mortgage insurance, or mortgage guaranty insurance.

### § 925. Supplemental accounting, financial, and actuarial information; examination and opinion

Upon request of the commissioner, and at intervals as prescribed by him or her, any insurer that appears to the commissioner to require immediate regulatory attention shall provide to the commissioner supplemental accounting, financial, and actuarial information. The commissioner may request that an insurer select and retain an independent certified public accountant, certified public accountant corporation, an actuary corporation, or an independent actuary satisfactory to the commissioner, if that person has not already been retained by the insurer, whenever the information supplied or likely to be supplied is not satisfactory or acceptable to the commissioner, or, whenever the person who would be responsible for that preparation of that information has previously provided information that was not satisfactory or acceptable to the commissioner. The commissioner may select or retain an independent certified public accountant, a certified public accountant corporation, an actuary corporation, or an independent actuary, if the insurer does not within a reasonable time make the selection as requested by the commissioner. If the information is prepared by an independent certified public accountant or independent actuary, or other independent professional financial corporation or person, the corporation or person shall examine and render an opinion upon that supplemental information.



### § 925.2. Subject matter and form of reporting supplemental information; subject matter of opinions

The commissioner may prescribe the subject matter and form of reporting supplemental information and the subject matter of opinions.

### § 925.4. Powers of commissioner

Nothing contained herein shall be deemed in any manner to limit, restrict or abridge the powers of the commissioner to examine insurers, to inquire into their financial condition or to obtain supplemental information in accordance with any other provision of this code.

## ARTICLE 14. PROCEEDINGS IN CASES OF INSOLVENCY AND DELINQUENCY

### § 1010. Scope of article

The provisions of this article shall apply to all persons subject to examination by the commissioner, or purporting to do insurance business in this State, or in the process of organization with intent to do such business therein, or from whom the commissioner's certificate of authority is required for the transaction of business, or whose certificate of authority is revoked or suspended.

### § 1011. Court order vesting title of assets in commissioner; grounds

The superior court of the county in which is located the principal office of such person in this state shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist, issue its order vesting title to all of the assets of such person, wheresoever situated, in the commissioner or his successor in office, in his official capacity as such, and direct the commissioner forthwith to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the

commissioner may seem appropriate, and enjoining said person and its officers, directors, agents, servants, and employees from the transaction of its business or disposition of its property until the further order of said court:

(a) That such person has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the commissioner or his deputy or examiner.

(b) That such person has neglected or refused to observe an order of the commissioner to make good within the time prescribed by law any deficiency in its capital if it is a stock corporation, or in its reserve if it is a mutual insurer.

(c) That such person, without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without such consent, has entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person.

(d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or creditors, or to the public.

(e) That such person has violated its charter or any law of the state.

(f) That any officer of such person refuses to be examined under oath, touching its affairs.

(g) That any officer or attorney in fact of such person has embezzled, sequestered, or wrongfully diverted any of the assets of such person.

(h) That a domestic insurer does not comply with the requirements for the issuance to it of a certificate of authority, or that its certificate of authority has been revoked; or



(i) That the last report of examination of any person to whom the provisions of this article apply shows such person to be insolvent within the meaning of Article 13 (commencing with Section 980), Chapter 1, Part 2, Division 1; or if a reciprocal or interinsurance exchange, within the applicable provisions of Section 1370.2, 1370.4, 1371, or 1372; or if a life insurer, within the applicable provisions of Sections 10510 and 10511.

**§ 1011.5. Consent to transfer; application; fee**

The consent described in Section 1011(c) shall be obtained by filing an application with the commissioner in a form to be prescribed by him accompanied by such additional information concerning the insurer, its condition and affairs as the commissioner requires.

A fee of two thousand six hundred fifty-five dollars ($2,655) shall be paid to the commissioner for the filing of the application.

**§ 1012. Duration of order; hearing**

Said order shall continue in force and effect until, on the application either of the commissioner or of such person, it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business.

**§ 1013. Commissioner's power of summary seizure; grounds**

Whenever it appears to the commissioner that any of the conditions set forth in section 1011 exist or that irreparable loss and injury to the property and business of a person specified in section 1010 has occurred or may occur unless the commissioner so act immediately,

the commissioner, without notice and before applying to the court for any order, forthwith shall take possession of the property, business, books, records and accounts of such person, and of the offices and premises occupied by it for the transaction of its business, and retain possession subject to the order of the court. Any person having possession of and refusing to deliver any of the books, records or assets of a person against whom a seizure order has been issued by the commissioner, shall be guilty of a misdemeanor and punishable by fine not exceeding one thousand dollars or imprisonment not exceeding one year, or both such fine and imprisonment.

### § 1014. Assistance of peace officers

Whenever the commissioner makes any seizure as provided in section 1013, it shall, on the demand of the commissioner, be the duty of the sheriff of any county of this State, and of the police department of any municipal corporation therein, to furnish him with such deputies, patrolmen or officers as may be necessary to assist the commissioner in making and enforcing any such seizure.

### § 1015. Procedure following summary seizure

Immediately after such seizure, the commissioner shall institute a proceeding as provided for in section 1011 and thereafter shall proceed in accordance with the provisions of this article.

### § 1016. Application for liquidation order; hearing; court order

If at any time after the issuance of an order under section 1011, or if at the time of instituting any proceeding under this article, it shall appear to the commissioner that it would be futile to proceed as conservator with the conduct of the business of such person, he may apply to the court for an order to liquidate and wind up the



business of said person. Upon a full hearing of such application, the court may make an order directing the winding up and liquidation of the business of such person by the commssioner, as liquidator, for the purpose of carrying out the order to liquidate and wind up the business of such person.

### § 1017. Order dissolving corporation

In his application for an order for the liquidation of a domestic corporation, or at any time thereafter, the commissioner may apply for, and the court shall make, an order dissolving such corporation.

### § 1018. Recordation of court orders

The recording in the office of a county recorder of any county in the State of an order entered pursuant to section 1011, 1016 or 1017 shall impart the same notice that would be imparted by the recordation of a deed, bill of sale or other evidence of title duly executed by such person.

### § 1019. Date of vesting of claimant's rights

Upon the issuance of an order of liquidation under section 1016, the rights and liabilities of any such person and of creditors, policyholders, shareholders and members, and all other persons interested in its assets, including the State of California, shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order in the office of the clerk of the county wherein the application was made.

### § 1020. Injunctions; other court orders

Upon the issuance of an order either under Section 1011 or 1016, or at any time thereafter, the court shall issue such other injunctions or orders as may be deemed necessary to prevent any or all of the following occurrences:

(a) Interference with the commissioner or the proceeding.

(b) Waste of assets of such person.

(c) The institution or prosecution of any actions or proceedings.

(d) The obtaining of preferences, judgments, attachments, or other liens against such person or its assets.

(e) The making of any levy against any such person or its assets.

(f) The sale or deed for nonpayment of taxes or assessments levied by any taxing agency of property:

(1) Owned by such person.

(2) Upon which such person holds an encumbrance.

(3) Upon which such person has prior thereto commenced an action to foreclose any deed of trust or mortgage or has exercised the power of sale under any trust deed or mortgage which sale or foreclosure proceedings have not yet been completed or upon which no trustee's deed or judgment of court or sheriff's certificate of sale has been issued. "Taxing agency" as used in this section has the meaning ascribed to it by Section 121 of the Revenue and Taxation Code. The injunctions or orders authorized by this subdivision may be modified, dissolved or rescinded by the court on motion of the commissioner, the State Controller, the person charged with the collection of taxes or assessments on such property, or any person beneficially interested in the property. The recording in the office of the county recorder of any county in the State of an order or injunction issued pursuant to this section, shall constitute service of such order or injunction upon any taxing agency with respect to property or interests therein located in such county.

(g) Any managing general agent or attorney in fact from withholding from the commissioner any books,



records, accounts, documents or other writing relating to the business of such person; provided, however, that, if by contract or otherwise any of the same are the property of such an agent or attorney, the same shall be returned when no longer necessary to the commissioner or at any time the court after notice and hearing shall so direct.

### § 1021. Notice to claimants

(a) Upon the making of an order to liquidate the business of such person, the commissioner shall cause to be published notice to its policyholders, creditors, shareholders, and all other persons interested in its assets. Such notice shall require claimants to file their claims with the commissioner, together with proper proofs thereof, within six months after the date of first publication of such notice, in the manner specified in this article.

(b) The six-month period specified in subdivision (a) shall not apply to the California Insurance Guarantee Association or the California Life and Health Insurance Guarantee Association provided it files with the commissioner a notice of possible claim within such six-month period and files actual claim or claims within such periods of time as may be permitted by order of court.

### § 1022. Publication of notice

Such notice shall be published in a newspaper of general circulation, published in the county in which the proceeding is pending, not less than once a week for four successive weeks. A copy of the notice, accompanied by an affidavit of due publication, including a statement of the date of first publication, shall be filed with the clerk of the court.

### § 1023. Form and contents of claim

A claim must set forth, under oath, on the form prescribed by the commissioner:

(a) The particulars thereof, and the consideration therefor.

(b) Whether said claim is secured or unsecured, and, if secured, the nature and amount of such security.

(c) The payments, if any, made thereon.

(d) That the sum claimed is justly owing from such person to the claimant.

(e) That there is no offset to the claim.

(f) Such other data or supporting documents as the commissioner requires.

### § 1024. Failure to file claims; life insurance death claims

Unless such claim is filed in the manner and within the time provided in section 1021, it shall not be entitled to filing or allowance, and no action may be maintained thereon. In the liquidation, pursuant to the provisions of this article, of any domestic insurer which has issued policies insuring the lives of persons, the commissioner shall, within thirty days after the last day set for the filing of claims, make a list of the persons who have not filed proofs of claim with him and to whom, according to the books of said insurer, there are amounts owing under such policies, and he shall set opposite the name of each person the amount so owing to such person. Each person whose name shall appear upon said list shall be deemed to have duly filed, prior to the last day set for the filing of claims, a claim for the amount set opposite his name on said list.

### § 1025. Unliquidated claims

Claims founded upon unliquidated or undetermined demands must be filed within the time limit provided in this article for the filing of claims, but claims founded upon such demands shall not share in any distribution to creditors of a person proceeded against under section



1016 until such claims have been definitely determined, proved and allowed. Thereafter, such claims shall share ratably with other claims of the same class in all subsequent distributions.

An unliquidated or undetermined claim or demand within the meaning of this article shall be deemed to be any such claim or demand upon which a right of action has accrued at the date of the order of liquidation and upon which the liability has not been determined or the amount thereof liquidated.

### § 1025.5. Alternative procedures to requiring separate claims

Notwithstanding the provisions of Section 1021 to 1025, inclusive, the commissioner may, in lieu of requiring claimants to file separate claims:

(a) File a claim himself or herself on behalf of all claimants for return premiums.

(b) Permit any assignee of the right of the insured to a return premium by virtue of a valid assignment, as security or otherwise, made prior to an order under Section 1011 or a seizure under Section 1013, whichever is earlier in time in the particular case, to file one claim as assignee on behalf of all insureds having assigned rights to the assignee, which shall set forth such information as may be required under Section 1023.

(c) Permit the California Insurance Guarantee Association under subdivision (b) of Section 1063.4, or the California Life and Health Insurance Guarantee Association under paragraph (1) of subdivision (m) of Section 1067.07 to file one claim, for its association, combining all assigned claims and setting forth the information that the commissioner may require under Section 1023.

### § 1026. Third party liability claims

Whenever any person has a cause of action against an insured and such cause is covered by a liability policy, such person, if the insurer is adjudged insolvent, may file a claim in the liquidation proceeding even if the claim is undetermined or unliquidated.

### § 1026.1. Subrogation to rights of third party claimant

Where a claim arising out of a policy of insurance has been filed by a third party and approved by the liquidator and such claim has subsequently been paid or satisfied, either wholly or in part, by the transfer of anything of value, either voluntarily or by process, from the insured of the person in liquidation to such third party, then upon the filing with the liquidator of proof of the making and value of such transfer, to the extent and in the manner required by the liquidator, the insured shall be subrogated to the rights of the third party claimant to the extent that the claim has been satisfied and discharged, but the rights of the insured shall not exceed the face value of such claim and if the insured has theretofore filed a claim covering the same subject matter, he is entitled to only one recovery.

### § 1027. Allowance of third party liability claims

A claim by a third party founded upon an insurance policy may be allowed by the liquidator without requiring such claim to be reduced to judgment, provided it can be reasonably inferred from the proof presented that the claimant would be able to obtain a judgment upon his cause of action against the insured and that such judgment would represent a liability of the person in liquidation under the policy of insurance upon which such claim is founded.

In the event several claims founded upon one policy or bond are filed, and the aggregate amount of such



claims exceeds the liability limit of said policy or bond, and one or more of such claims is unliquidated and undetermined, then all of such claims shall be deemed unliquidated and undetermined; provided, however that should one or more of said claims become determined and proved within the time provided in this article, the liquidator, upon any distribution to creditors, shall impound the distribution percentage of the face amount of said claim or claims so determined and proved, not exceeding the policy or bond limit, and upon such claim or claims becoming liquidated as to amount, the liquidator shall release to such claimant the distribution percentage of the final liquidated value of such claims out of the funds so impounded.

### § 1028. Default or collusive judgment against insured

A judgment taken by default, or by collusion, against an insured shall not be considered as evidence, in the liquidation proceeding, either of the liability of such insured to such claimant upon such cause of action or of the amount of damages to which such claimant is entitled.

### § 1029. Secured claimant

A claim of a secured claimant shall not be allowed in a sum greater than the excess over the value of the security of the amount for which the claim would be allowable if unsecured, unless the claimant surrenders the security to the liquidator. Upon such surrender the claim may be allowed in the full amount for which it is valued.

### § 1030. Valuation of security

The value of the security to be credited upon such claim shall be determined by an appraiser appointed by the liquidator and approved by the court. Such claimant shall elect to accept the security or to release it to the liquidator.

### § 1030.5. Conditions for payment of final liquidation dividend to lender; insured defined

(a) The liquidator may require, as a condition of payment of the final liquidation dividend to a lender, or his assignee, who has filed a claim for an unearned premium as an assignee of the insured for valuable consideration, that such assignee of the insured shall assign to the liquidator all his right, title, and interest in any unsatisfied debt of the insured to such assignee, pertaining to policies of the insolvent insurer, remaining unpaid after crediting the final liquidation dividend, if the amount of such unsatisfied debt is less than one hundred dollars and one cent ($100.01).

The liquidator may also require, as condition precedent, the delivery to him of all the documents giving rise to such debt.

The liquidator, in his sole discretion, may determine whether or not it will be feasible to attempt to collect any such assigned debt. If he determines not to pursue collection of any such debt, he shall file a declaration to that effect with the liquidation court and be relieved of any further responsibility in respect to such debt.

(b) As used in this section, "insured" means a natural person who purchased insurance from the insolvent insurer for personal, family, or household purposes.

### § 1030.6. Unearned premiums or commission uncollected by agent

In any proceeding under this article, no agent shall be liable to the liquidator or conservator for unearned premiums uncollected by the agent, or unearned commissions uncollected by the agent, arising from an insolvency of an insurer.



### § 1031. Set-off of claims

In all cases of mutual debts or mutual credits between the person in liquidation under Section 1016 and any other person, such credits and debts shall be set off and the balance only shall be allowed or paid, but no set-off shall be allowed in favor of such other person where any of the following facts exist:

(a) The obligation of the person in liquidation to such other person does not entitle such other person claiming such set-off to share as a claimant in the assets of such person in liquidation.

(b) The obligation of the person in liquidation to such other person was purchased by, or transferred to, such other person.

(c) The obligation of such other person to the person in liquidation is to pay an assessment levied against such other person or to pay a balance upon a subscription for shares of the capital stock of the person in liquidation.

### § 1032. Rejection of claim; notice; application for show-cause order

When a claim is rejected by the commissioner, written notice of rejection shall be given by mail, addressed to the claimant at the address set forth in his claim. Within 30 days after the mailing of the notice the claimant may apply to the court in which the liquidation proceeding is pending for an order to show cause why the claim should not be allowed.

### § 1033. Priorities in allowance; satisfaction of claims under separate account policy, contract, or agreement

(a) Claims allowed in a proceeding under this article shall be given preference in the following order:

(1) Expense of administration.

(2) Unpaid charges due under the provisions of Section 736.

(3) Taxes due to the State of California.

(4) Claims having preference by the laws of the United States and by laws of this state.

(5) All claims of the California Insurance Guarantee Association or the California Life and Health Insurance Guaranty Association, and associations or entities performing a similar function in other states, together with claims for refund of unearned premiums and all claims of policyholders of an insolvent insurer that are not covered claims.

Claims excluded by paragraphs (3) (except claims for refund of unearned premiums), (4), (5), (7), and (8) of subdivision (c) of Section 1063.1, subdivisions (h) and (i) of Section 1063.2, and paragraph (2) of subdivision (b) of Section 1067.02, shall be excluded from this priority.

(6) All other claims.

(b)(1) Every claim allowed under a separate account policy, contract, or agreement providing, in effect, that the assets allocated to the separate account shall not be chargeable with liabilities arising out of any other business of the insurer, shall be satisfied out of the assets properly allocated to and maintained in the separate account, excluding amounts allocated or transferred to the separate account by the insurer pursuant to subdivision (b) of Section 10506, equal to the reserves maintained in the separate account for the policies, contracts, or agreements. No liabilities of the insurer arising out of any other business of the insurer shall be satisfied from assets properly allocated to and maintained in a separate account except (1) from amounts allocated or transferred to the separate account pursuant to subdivision (b) of Section 10506 and (2) from any assets allocated to the separate account which exceed the reserves under the



separate account policies, contracts, or agreements. For the purposes of this subdivision, "separate account policicies, contracts, or agreements" shall mean any policies, contracts, or agreements that provide for separate accounts as contemplated by Section 10506, 10506.3, 10506.4, or 10541. Any valid and allowed claim against the general account for contractual benefits under an obligation authorized by Section 10506.4 shall be included as a claim within paragraph (5) of subdvision (a).

(2) Notwithstanding any other provision of law, to the extent that any assets of a life insurer, other than those assets properly allocated to, and maintained in, a separate account, have been used to fund or pay any expenses, taxes, or policyholder benefits that are attributable to a separate account policy, contract, or agreement which should have been paid by a separate account prior to the commencement of delinquency proceedings, then upon the commencement of delinquency proceedings, the separate accounts which benefited from this payment or funding shall first be used to repay or reimburse the company's general assets or account for any unreimbursed net sums due at the commencement of delinquency proceedings prior to the application of the separate account assets to the satisfaction of liabilities of the corresponding separate account policies, contracts, and agreements.

(c) Upon the issuance of an order appointing a conservator or liquidator for any person under the provisions of either Section 1011 or 1016 or both these sections, the lien of taxes due to the State of California imposed by Article 4 (commencing with Section 12491) of Chapter 4 of Part 7 of Division 2 of the Revenue and Taxation Code shall become subordinate to the reasonable administrative expenses of the proceeding under the order.

**§ 1034. Voidable transactions**

After the issuance of an order of liquidation under Section 1016, any of the following transactions occurring within four months prior to the application for

the order shall be voidable by the commissioner if the transaction has the effect of giving to or enabling any creditor of the person to obtain a preference over any other creditor of the same class, or a greater percentage of his or her debt than any other creditor of the same class:

(a) A transfer of property of the person.

(b) The creation of a lien on the property of the person.

(c) The suffering of a judgment against the person.

(d) The transfer or other payments by the person pursuant to subdivision (f) of Section 10506 in support of guarantees contemplated by Section 10506.4.

**§ 1035. Deputy commissioners, clerks and assistants; employment; powers; costs and expenses**

In any proceeding under this article, the commissioner shall have the power to appoint and employ under his or her hand and official seal, special deputy commissioners, as his or her agents, and to employ clerks and assistants and to give to each of them those powers that he or she deems necessary. Upon appointing or employing special deputy commissioners, clerks, or assistants, the commissioner shall notify the Chair of the Joint Budget Committee of the Legislature, by letter, of the action. The costs of employing special deputy commissioners, clerks, and assistants appointed to carry out this article, and all expenses of taking possession of, conserving, conducting, liquidating, disposing of, or otherwise dealing with the business and property of that person under this article, shall be fixed by the commissioner, subject to the approval of the court, and shall be paid out of the assets of that person to the department. In the event the property of that person does not contain cash or liquid assets sufficient to defray the cost of the services required to be performed under the terms of this article, the commissioner may at any time or from time to time pay the cost of those services out of the appropriation for the maintenance of the department, but not out of the assets of other estates. Any amounts so paid shall be deemed expense of administration and shall be repaid to the fund out of the first available moneys in the estate.



**§ 1035.5. Disbursement of assets; offset of amount disbursed**

Notwithstanding the provisions of Article 14 (commencing with Section 1010), with regard only to those insurers subject to this article:

(a) Within 120 days of the issuance of an order directing the winding up and liquidation of the business of an insolvent insurer under Section 1016, the commissioner shall make application to the court for approval of a proposal to disburse the insurer's assets, from time to time as such assets become available, to the California Inurance Guarantee Association, or the California Life and Health Insurance Guarantee Association, and to any entity or person performing a similar function in another state.

(b) The proposal shall at least include the following provisions for:

(1) Reserving amounts for the payment of expenses of administration and the payment of claims of secured creditors (to the extent of the value of the security held) and claims falling within the priorities established in paragraphs (1) to (4), inclusive, of subdivision (a) of Section 1033.

(2) Disbursement of the assets marshaled to date and subsequent disbursements of assets as they become available.

(3) Equitable allocation of disbursements to each of the associations entitled thereto.

(4) The securing by the commissioner from each of the associations entitled to disbursements pursuant to this section of an agreement to return to the commissioner such assets previously disbursed as may be required to pay claims of secured creditors and claims falling within the priorities established in paragraphs (1) to (5), inclusive, of subdivision (a) of Section 1033 in accordance with the priorities. No bond shall be required of any association.

(5) A full report to be made by the association to the commissioner accounting for all assets so disbursed to the association, all disbursements made therefrom, any interest earned by the association on the assets, and any other matter as the court may direct.

(c) The commissioner's proposal shall provide for disbursements to the associations in amounts estimated at least equal to the claim payments made or to be made by the associations for which such associations could assert a claim against the commissioner, and shall further provide that if the assets available for disbursement from time to time do not equal or exceed the amount of the claim payments made or to be made by the associations, then disbursements shall be in the amount of available assets. The reserves of the insolvent insurer on the date of the order of liquidation shall be used for purposes of determining the pro rata allocation of funds among eligible associations.

(d) The commissioner shall offset the amount disbursed to any entity or person performing a function in any other state similar to that function performed by the California Insurance Guarantee Association, or the California Life and Health Insurance Guarantee Association, by the amount of any statutory deposit, premiums, or any other asset of the insolvent insurer held in that state.

(e) Notice of such application shall be given to the associations in and to the commissioners of insurance



of each of the states. Any such notice shall be deemed to have been given when deposited in the United States certified mails, first-class postage prepaid, at least 30 days prior to submission of such application to the court. Action on the application may be taken by the court provided the above required notice has been given and provided further that the commissioner's proposal complies with paragraphs (1) and (4) of subdivision (b).

### § 1036. Employment of legal counsel; compensation

The Attorney General shall have the power to appoint and employ such legal counsel as may by him be deemed necessary to assist the commissioner in the performance of his duties under this article. The compensation of such legal counsel shall be fixed by the Attorney General, subject to the approval of the court, and shall be paid out of the assets of the person against whom the commissioner has proceeded under this article.

### § 1037. Powers of commissioner as conservator or liquidator

Upon taking possession of the property and business of any person in any proceeding under this article, the commissioner, exclusively and except as otherwise expressly provided by this article, either as conservator or liquidator:

(a) **[Conservation of assets; conduct of business.]** Shall have authority to collect all moneys due that person, and to do such other acts as are necessary or expedient to collect, conserve, or protect its assets, property, and business, and to carry on and conduct the business and affairs of that person or so much thereof as to him or her may seem appropriate.

(b) **[Collection of debts; sale, compromise, and assignment.]** Shall collect all debts due and claims belonging to that person, and shall have the authority to sell, com-

pound, compromise, or assign, for the purpose of collection upon such terms and conditions as the commissioner deems best, any bad or doubtful debts.

(c) **[Compounding, compromising, and settling claims.]** Shall have authority to compound, compromise or in any other manner negotiate settlements of claims against that person upon such terms and conditions as the commissioner shall deem to be most advantageous to the estate of the person being administered or liquidated or otherwise dealt with under this article.

(d) **[Acquisition and disposition of property.]** Shall have authority without notice, to acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with, any real or personal property of that person at its reasonable market value, or, in cases other than acquisition, sale, or transfer on the basis of reasonable market value, upon such terms and conditions as the commissioner may deem proper. However, no transaction involving real or personal property shall be made where the market value of the property involved exceeds the sum of twenty thousand dollars ($20,000) without first obtaining permission of the court, and then only in accordance with any terms that court may prescribe.

(e) **[Transfer of stock to voting trust.]** Shall have authority to transfer to a trustee or trustees, under a voting trust agreement, the stock of an insurer heretofore or hereafter issued to the commissioner as conservator or as liquidator in connection with a rehabilitation or reinsurance agreement, or any other proceeding under this article. This voting trust agreement shall confer upon the trustee or trustees the right to vote or otherwise represent that stock, and shall not be irrevocable for a period of more than 21 years.

(f) **[Lawsuits, execution of instruments.]** May, for the purpose of executing and performing any of the pow-



ers and authority conferred upon the commissioner under this article, in the name of the person affected by the proceeding or in the commissioner's own name, prosecute and defend any and all suits and other legal proceedings, and execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary and proper to effectuate any sale of any real and personal property or other transaction in connection with the administration, liquidation, or other disposition of the assets of the person affected by that proceeding; and any deed or other instrument executed pursuant to the authority hereby given shall be valid and effectual for all purposes as though it had been executed by the person affected by any proceeding under this article or by its officers pursuant to the direction of its governing board or authority. In cases where any real property sold by the commissioner under this article is located in a county other than the county wherein the proceeding is pending, the commissioner shall cause a certified copy of the order of his or her appointment, or order authorizing or ratifying the sale, to be filed in the office of the county recorder of the county in which that property is located.

(g) **[Investments.]** Shall have authority to invest and reinvest, in such manner as the commissioner may deem suitable for the best interests of the creditors of that person, such portions of the funds and assets of that person in his or her possession as do not exceed the amount of the reserves required by law to be maintained by that person as reserves for life insurance policies, annuity contracts, supplementary agreements incidental to the business, and reserves for noncancellable disability policies, and which funds and assets are not immediately distributable to creditors. However, no investment or reinvestment shall be made which exceeds the sum of one hundred thousand dollars ($100,000) without first obtaining permission of the court, and then only in accordance with any terms that court may prescribe. That permission shall not

be required for any investment or reinvestment of those funds or assets in funds administered by the Treasurer.

**[General powers.]** The enumeration, in this article, of the duties, powers and authority of the commissioner in proceedings under this article shall not be construed as a limitation upon the commissioner, nor shall it exclude in any manner his or her right to perform and to do such other acts not herein specifically enumerated, or otherwise provided for, which the commissioner may deem necessary or expedient for the accomplishment or in aid of the purpose of such proceedings.

### § 1038. Service of application for conservation or liquidation

Any application under section 1011 or 1016 shall be served upon the person named in such application in the manner prescribed by law for personal service of summons or as provided by section 1039.

### § 1039. Substituted service

In lieu of the service required by section 1038, service may, upon application to said court, be made in such manner as the court directs whenever it is satisfactorily shown by affidavit (a) in the case of a corporation, that the officers of the corporation upon whom service is required to be made as above provided, have departed from the State or keep themselves concealed therein with intent to avoid the service, or, (b) in the case of a Lloyd's association or interinsurance exchange, that the individual attorney in fact or the officers of the corporate attorney in fact can not be served because of such departure or concealment, or, (c) in the case of a natural person, that the natural person upon whom service is required to be made as above provided, has departed from the State or keeps himself concealed therein with intent to avoid the service.



### § 1040. Removal of insurer's principal office; change of venue

At any time after an order is made under section 1011 or 1016, the commissioner may remove the principal office of the person proceeded against to the City and County of San Francisco or to the city of Los Angeles. In event of such removal, the court wherein the proceeding was commenced shall, upon the application of the commissioner, direct its clerk to transmit all of the papers filed therein with such clerk to the clerk of the City and County of San Francisco or of the county of Los Angeles as the case may require. The proceeding shall thereafter be conducted in the same manner as though it had been commenced in the county to which it had been transferred.

### § 1041. Custody of money; deposit in bank; investment

The commissioner shall be the custodian of all moneys collected by him or her or coming into his or her possession in the course of any proceeding under this article, but the commissioner may deposit those moneys, or any part thereof, without court approval in a bank which is a member of the Federal Deposit Insurance Corporation (FDIC), so long as the total deposit did not exceed those federal insurance limits; in a centralized State Treasury system bank account; or in funds administered by the Treasurer.

Provided further, any money which is deposited by the commissioner pursuant to this section, which the commissioner determines is available for investment, may be invested or reinvested by the Treasurer in any of the securities which are described in Article 1 (commencing with Section 16430) of Chapter 3 of Part 2 of Division 4 of Title 2 of the Government Code, or placed in a bank as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2 of the Government Code, and handled in the same manner as

money in the State Treasury. Any increment which is received from that investment or reinvestment or deposit shall be remitted to the commissioner for allocation, upon a proper and equitable basis, to each estate participating in the investment, reinvestment, or deposit and deposited and disbursed as provided in Section 1037. The Treasurer may deduct from that remittance an amount equal to the reasonable costs incurred in carrying out this section or may bill the commissioner for those costs and the commissioner shall pay those costs from money which is collected pursuant to this chapter.

### § 1042. Subpoena powers; examination of witnesses under oath

The commissioner and a special deputy commissioner appointed pursuant to section 1035 shall have the power to subpoena witnesses and examine them under oath upon any subject relating to the affairs and business of any person affected by proceedings under this article. The penalties provided in Chapter 2, Title 3, Part 4 of the Code of Civil Procedure [1] shall apply to any witness who fails or refuses to appear in accordance with such subpoena, or to testify in connection therewith.

### § 1056.5. Disposition of unclaimed funds

Whenever money or other property is payable to any claimant out of the assets of any person under the provisions of Sections 1021 to 1033, but such person cannot be located or for any other reason the payment of such money or other property to such person cannot be made, although assets are available for such payment, such money or other property shall be deposited in the State Treasury by the commissioner. Such deposits shall be deemed to have been received under the provisions of Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure, and shall be subject to claim or other disposition as provided in said Chapter 7 (commencing with Section 1500) of Title 10. The commissioner may pay over the money or other property held by him to the persons respectively entitled thereto at any time prior to such deposit, upon being furnished satisfactory evidence of their right to the same.

[1] Code of Civil Procedure § 1985 et seq.



### § 1057. Status of commissioner as trustee

In all proceedings under this article, the commissioner shall be deemed to be a trustee for the benefit of all creditors and other persons interested in the estate of the person against whom the proceedings are pending.

### § 1058. Jurisdiction of court

In any proceeding pending under the provisions of this article, the court in which such proceeding is pending shall have jurisdiction to hear and determine, in such proceeding, all actions or proceedings then pending or thereafter instituted by or against the person affected by a proceeding under this article.

### § 1059. Status of commissioner as public officer

The commissioner, in the performance of any of his duties under this article, shall be deemed to be a public officer acting in his official capacity on behalf of the State, and the provisions of Chapter 2, Division 7, Title 1 of the Government Code [1] shall apply to him.

### § 1060. Report of Governor

The commissioner shall transmit to the Governor an annual report showing:

(a) The names of the persons proceeded against under this article.

(b) Whether such persons have resumed business or have been liquidated or have been mutualized.

[1] Government Code § 6100 et seq.

(c) Such other facts as will acquaint the Governor, the policyholders, creditors, shareholders and the public with his proceedings under this article.

### § 1061. Annual examination of estates; report to court; expense of examination

In verification of the matters set forth in Section 1060 of this code, the Department of Finance shall, at least every two years or more often if requested by the commissioner, examine the commissioner's books and accounts relating to all proceedings under this article and Article 8 (commencing with Section 12550), Chapter 2, Part 6, Division 2 of this code, and shall file a report of each such examination with the court in which the respective proceeding is pending and shall furnish the commissioner a certified copy of each such report. The expense of examining the books and accounts of the commissioner as conservator or liquidator under this article or under Article 8 (commencing with Section 12550), Chapter 2, Part 6 of Division 2 of this code shall be paid out of the support appropriation for the Department of Insurance current at the date of billing for such expense and shall, upon order of the court or courts before which the proceedings under said articles are pending, be ratably reimbursed to such appropriation out of the assets of the estates administered by the commissioner as conservator or liquidator under this article or under Article 8 (commencing with Section 12550), Chapter 2, Part 6 of Division 2 of this code.

### § 1062. Assessment liability; termination; levy

In the event of the entry of an order under Section 1011 or 1016 of this article affecting any person having members, subscribers or policyholders, hereinafter referred to as "members" who are liable for assessment by law or by the provisions of their policies or contracts, and in which the termination of the policy or contract does not



relieve the member from such liability, where the commissioner in his discretion decides that an assessment would be in order, the liability of such members shall be determined, and the assessment therefor levied in the following manner:

1. **[Report.]** Within one year from the date of the entry of the order under the provisions of Section 1011 or 1016 of this article, the commissioner shall make a report to the court setting forth: (a) the reasonable value of the assets of such person; (b) its probable liabilities, including reasonable costs of liquidation; and (c) the probable necessary assessment, if any, to pay all claims in full.

2. **[Calculation.]** Upon the basis of such report, including any amendments thereof, the court shall determine the basis for calculating the liability of each member, subscriber or policyholder and shall order the commissioner to determine the amount of liability of each of the members.

3. **[Notice of amount.]** Thereafter the commissioner shall give notice to each member, subscriber or policyholder of the amount of his liability by inclosing notice thereof in a sealed envelope, addressed and mailed, postage prepaid, to each member, subscriber or policyholder at his last known address as the same appears upon the books of the insurer.

4. **[Report of delinquencies; court order.]** Not less than 20 days after the mailing of said notice, as provided in paragraph 3 of this section, the commissioner shall report to the court the names of the members, subscribers or policyholders who have failed to pay their assessment in accordance with said notice, whereupon the court shall issue an order directing each of said members, subscribers or policyholders to appear in said court and show cause in the proceedings pending against such person, why he should not be held liable to pay such assessment, and why the commissioner should not have judgment therefor.

5. **[Notice of court order.]** The commissioner shall cause a notice of such order setting forth a brief summary of the contents thereof: (a) to be published in such manner as shall be directed by the court; and (b) to be inclosed in a sealed envelope, addressed and mailed by registered mail with return receipt requested, postage prepaid, to each of said members whose liability for assessment remains unpaid, at his last known address, at least 20 days before the return day of such order to show cause.

6. **[Hearing, final order.]** On the return day of such order to show cause, (a) if such member shall not appear and serve verified objections on the commissioner, the court shall make an order adjudicating that such member is liable for the amount of such assessment, and that the commissioner may have a judgment against such member therefor; (b) if such member shall appear and serve verified objections upon the commissioner, there shall be a full hearing before the court, and if the court affirms his liability to pay the whole or some part of said assessment, the commissioner may have judgment therefor.

7. **[Judgment.]** A judgment upon any such order, shall have the same force and effect, and may be entered and may be appealed from as if it were a judgment in an original action brought in the court in which the proceeding is pending.

## ARTICLE 14.2. CALIFORNIA INSURANCE GUARANTEE ASSOCIATION

### § 1063. Establishment; powers and duties

(a) Within 60 days after the original effective date of this article, all insurers, including reciprocal insurers, admitted to transact insurance in this state of any or all of the following classes only in accordance with the provisions of Chapter 1 (commencing with Section 100) of Part 1 of this division: fire (see Section 102), marine



(see Section 103), plate glass (see Section 107), liability (see Section 108, workers' compensation (see Section 109), common carrier liability (see Section 110), boiler and machinery (see Section 111), burglary (see Section 112), sprinkler (see Section 114), team and vehicle (see Section 115), automobile (see Section 116), aircraft (see Section 118), and miscellaneous (see Section 120), shall establish the California Insurance Guarantee Association (the association; provided, however, this article shall not apply to the following classes or kinds of insurance: life and annuity (see Section 101), title (see Section 104), fidelity or surety including fidelity or surety bonds, or any other bonding obligations (see Section 105), disability or health (see Section 106), credit (see Section 113), mortgage (see Section 117), mortgage guaranty, insolvency or legal (see Section 119), financial guaranty or other forms of insurance offering protection against investment risks (see Section 124), the ocean marine portion of any marine insurance or ocean marine coverage under any insurance policy including the following: the Jones Act (46 U.S.C. Sec. 688), the Longshore and Harbor Workers' Compensation Act (33 U.S.C. Sec. 901 et seq.), or any other similar federal statutory enactment, or any endorsement or policy affording protection and indemnity coverage, or reinsurance as defined in Section 620, or fraternal fire insurace written by associations organized and operating under Sections 9080 to 9103, inclusive. Any insurer admitted to transact only those classes or kinds of insurance excluded from this article shall not be a member insurer of the association. Each such insurer, including the State Compensation Insurance Fund, as a condition of its authority to transact insurance in this state, shall participate in the association whether established voluntarily or by order of the commissioner after the elapse of 60 days following the original effective date of this article in accordance with rules to be established as provided in this article. It shall be the purpose of such association to provide for each member insurer insolvency insurance as defined in Section 119.5.

(b) The association shall be managed by a board of governors, composed of nine member insurers, each of which shall be appointed by the commissioner to serve initially for terms of one, two, or three years and thereafter for three-year terms so that three terms shall expire each year on December 31, and shall continue in office until his or her successor shall be appointed and qualified. At least five members of the board shall be domestic insurers. At least three such members shall be stock insurers, and at least three shall be nonstock insurers. The nine members shall be representative, as nearly as possible, of the classes of insurance and of the kinds of insurers covered by this article. In case of a vacancy for any reason on the board, the commissioner shall appoint a member insurer to fill the unexpired term.

(c) The association shall adopt a plan of operations, and any amendments thereto, not inconsistent with the provisions of this article, necessary to assure the fair, reasonable, and equitable manner of administering the association, and to provide for such other matters as are necessary or advisable to implement the provisions of this article. The plan of operations and any amendments thereto shall be subject to prior written approval by the commissioner. All members of the association shall adhere to the plan of operation.

(d) If for any reason the association fails to adopt a suitable plan of operation within 90 days following the original effective date of this article, or if at any time thereafter the association fails to adopt suitable amendments to the plan of operation, the commissioner shall after hearing adopt and promulgate such reasonable rules as are necessary or advisable to effectuate the provisions of this chapter. Such rules shall continue in force until modified by the commissioner after hearing or superseded by a plan of operation, adopted by the association and approved by the commissioner.

(e) In accordance with its plan of operation, the association may designate one or more of its members as a



servicing facility, but a member may decline such designation. Each servicing facility shall be reimbursed by the association for all reasonable expenses it incurs and for all payments it makes on behalf of the association. Each servicing facility shall have authority to perform any functions of the association that the board of governors lawfully may delegate to it and to do so on behalf of and in the name of the association. The designation of servicing facilities shall be subject to the approval of the commissioner.

(f) The association shall have authority to borrow funds when necessary to effectuate the provisions of this article.

(g) The association, either in its own name or through servicing facilities, may be sued and may use the courts to assert or defend any rights the association may have by virtue of this article as reasonably necessary to fully effectuate the provisions thereof.

**§ 1063.1 Definitions**

As used in this article:

(a) "Member insurer" means an insurer required to be a member of the association in accordance with the provisions of subdivision (a) of Section 1063, except and to the extent that the insurer is participating in an insolvency program adopted by the United States government.

(b) "Insolvent insurer" means a member insurer against which an order of liquidation or receivership with a finding of insolvency has been entered by a court of competent jurisdiction.

(c)(1) "Covered claims" means the obligations of an insolvent insurer, including the obligation for unearned premiums, (i) imposed by law and within the coverage of an insurance policy of the insolvent insurer; (ii) which were unpaid by the insolvent insurer; (iii) which are presented as a claim to the liquidator in this state or to

the association on or before the last date fixed for the filing of claims in the domiciliary liquidating proceedings; (iv) which were incurred prior to the date coverage under the policy terminated and prior to, on, or within 30 days after the date the liquidator was appointed; (v) for which the assets of the insolvent insurer are insufficient to discharge in full; (vi) in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state; and (vii) in the case of other classes of insurance if the claimant or insured is a resident of this state at the time of the insured occurrence, or the property from which the claim arises is permanently located in this state.

(2) "Covered claims" shall not include any obligations arising from the following:

(i) Life, annuity, health, or disability insurance.

(ii) Mortgage guaranty, financial guaranty, or other forms of insurance offering protection against investment risks.

(iii) Fidelity or surety insurance including fidelity or surety bonds, or any other bonding obligations.

(iv) Credit insurance.

(v) Title insurance.

(vi) Ocean marine insurance or ocean marine coverage under any insurace policy including claims arising from the following: the Jones Act (46 U.S.C.A. Sec. 688),[1] the Longshore and Harbor Workers' Compensation Act (33 U.S.C.A. Sec. 901 et seq.), or any other similar federal statutory enactment, or any endorsement or policy affording protection and indemnity coverage.

(vii) Any claims servicing agreement or insurance policy providing retroactive insurance of a known loss

[1] See 46 App.U.S.C.A. 688.



or losses, except a special excess workers' compensation policy issued pursuant to paragraph (2) of subdivision (a) of Section 3702.8 of the Labor Code which cover all or any part of workers' compensation liabilities of an employer that was previously issued a certificate of consent to self-insure pursuant to subdivision (b) of Section 3700 of the Labor Code.

(3) "Covered claims" shall not include any obligations of the insolvent insurer arising out of any reinsurance contracts, nor any obligations incurred after the expiration date of the insurance policy or after the insurance policy has been replaced by the insured or canceled at the insured's request, or after the insurance policy has been canceled by the association as provided in this chapter, or after the insurance policy has been canceled by the liquidator, nor any obligations to any state or to the federal government.

(4) "Covered claims" shall not include any obligations to insurers, insurance pools, or underwriting associations, nor their claims for contribution, indemnity, or subrogation, equitable or otherwise, except as otherwise provided in this chapter.

No insurer, insurance pool, or underwriting association may maintain, in its own name or in the name of its insured, any claim or legal action against the insured of the insolvent insurer for contribution, indemnity or by way of subrogation, except insofar as, and to the extent only, that the claim exceeds the policy limits of the insolvent insurer's policy. In those claims or legal actions, the insured of the insolvent insurer shall be entitled to a credit or setoff in the amount of the policy limits of the insolvent insurer's policy, or in the amount of such limits remaining, where those limits have been diminished by the payment of other claims.

(5) "Covered claims," except in cases involving a claim for workers' compensation benefits, or for unearned

premiums, shall not include any claim in an amount of one hundred dollars ($100) or less, nor that portion of any claim which is in excess of any applicable limits provided in the insurance policy issued by the insolvent insurer.

(6) "Covered claims" shall not include that portion of any claim, other than a claim for workers' compensation benefits, which is in excess of five hundred thousand dollars ($500,000).

(7) "Covered claims" shall not include any amount sought as a return of a premium under any policy providing retroactive insurance of a known loss or losses.

(8) "Covered claims" shall not include any amount awarded as punitive or exemplary damages.

(9) "Covered claims" shall not include (i) any claim to the extent it is covered by any other insurance of a class covered by the provisions of this article available to the claimant or insured nor (ii) any claim by any person other than the original claimant under the insurance policy in his or her own name, his or her assignee as the person entitled thereto under a premium finance agreement as defined in Section 673 and entered into prior to insolvency, his or her executor, administrator, guardian or other personal representative or trustee in bankruptcy and shall not include any claim asserted by an assignee or one claiming by right of subrogation, except as otherwise provided in this chapter.

(10) "Covered claims" shall not include any obligations arising out of the issuance of an insurance policy written by the separate division of the State Compensation Insurance Fund pursuant to the provisions of Sections 11802 and 11803.

(11) "Covered claims" shall not include any obligations of the insolvent insurer arising from any policy or contract of insurance issued or renewed prior to the in-



solvent insurer's admission to transact insurance in the State of California.

(12) "Covered claims" shall not include surplus deposits of subscribers as defined in Section 1374.1.

(d) "Admitted to transact insurance in this state" means an insurer possessing a valid certificate of authority issued by the California Department of Insurance.

(e) "Affiliate" means a person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with an insolvent insurer on December 31 of the year next preceding the date the insurer becomes an insolvent insurer.

(f) "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, 10 percent or more of the voting securities of any other person. This presumption may be rebutted by showing that control does not in fact exist.

(g) "Claimant" means any insured making a first party claim or any person instituting a liability claim; provided that no person who is an affiliate of the insolvent insurer may be a claimant.

(h) "Ocean marine insurance" includes marine insurance as defined in Section 103, except for inland marine insurance, as well as any other form of insurance, regardless of the name, label, or marketing designation of the insurance policy, which insures against maritime perils or risks and other related perils or risks, which are usually

insured against by traditional marine insurance such as hull and machinery, marine builders' risks, and marine protection and indemnity. Those perils and risks insured against include, without limitation, loss, damage, or expense or legal liability of the insured arising out of or incident to ownership, operation, chartering, maintenance, use, repair, or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness, or death for loss or damage to the property of the insured or another person.

**§ 1063.2. Covered claims; duties; priority of claims**

(a) The association shall pay and discharge covered claims and in connection therewith pay for or furnish loss adjustment services and defenses of claimants when required by policy provisions. It may do so either directly by itself or through a servicing facility or through a contract for reinsurance and assumption of liabilities by one or more member insurers or through a contract with the liquidator, upon terms satisfactory to the association and to the liquidation, under which payments on covered claims would be made by the liquidator using funds provided by the association.

(b) The association shall be a party in interest in all proceedings involving a covered claim, and shall have the same rights as the insolvent insurer would have had if not in liquidation, including, but not limited to, the right to: (1) appear, defend, and appeal a claim in a court of competent jurisdiction; (2) receive notice of, investigate, adjust, compromise, settle, and pay a covered claim; and (3) investigate, handle, and deny a non-covered claim. The association shall have no cause of action against the insureds of the insolvent insurer for any sums it has paid out, except as provided by this article.



(c)(1) If damages against uninsured motorists are recoverable by the claimant from his or her own insurer, the applicable limits of the uninsured motorists coverage shall be a credit against a covered claim payable under this article. Any person having a claim that may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured, except that if it is a first-party claim for damage to property with a permanent location, he or she shall seek recovery first from the association of the permanent location of the property, and if it is a workers' compensation claim, he or she shall seek recovery first from the association of the residence of the claimant. Any recovery under this article shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent. A member insurer may recover in subrogation from the association only one-half of any amount paid by such insurer under uninsured motorist coverage for bodily injury or wrongful death (and nothing for a payment for anything else), in those cases where the injured person insured by such an insurer has proceeded under his or her uninsured motorist coverage on the ground that the tort feasor is uninsured as a result of the insolvency of his or her liability insurer (an insolvent insurer as defined in this article), provided that such member insurer shall waive all rights of subrogation against such tortfeasor. Any amount paid a claimant in excess of the amount authorized by this section may be recovered by action brought by the association.

(2) Any claimant having collision coverage on a loss which is covered by the insolvent company's liability policy shall first proceed against his or her collision carrier. Neither that claimant nor the collision carrier, if it is a member of the association, shall have the right to sue or continue a suit against the insured of the insolvent insurance company for such collision damage.

(d) The association shall have the right to recover from any person who is an affiliate of the insolvent insurer and whose liability obligations to other persons are satisfied in whole or in part by payments made under this article the amount of any covered claim and allocated claims expense paid on behalf of that person pursuant to this article.

(e) Any person having a claim or legal right of recovery under any governmental insurance or guaranty program which is also a covered claim, shall be required to first exhaust his or her right under the program. Any amount payable on a covered claim shall be reduced by the amount of any recovery under the program.

(f) "Covered claims" for unearned premium by lenders under insurance premium finance agreements as defined in Section 673 shall be computed as of the earliest cancellation date of the policy pursuant to Section 673 or subdivision (g) of this section.

(g) "Covered claims" shall not include any judgments against or obligations or liabilities of the insolvent insurer or the commissioner, as liquidator, or otherwise resulting from alleged or proven torts, nor shall any default judgment or stipulated judgment against the insolvent insurer, or against the insured of the insolvent insurer, be binding against the association.

(h) "Covered claims" shall not include any loss adjustment expenses, including adjustment fees and expenses, attorney fees and expenses, court costs, interest, and bond premiums, incurred prior to the appointment of a liquidator.

### § 1063.3. Member insurance insolvencies; detection and prevention; board activity

To aid in the detection and prevention of member insurer insolvencies:



(a) The board may, upon majority vote, make recommendations to the commissioner on matters pertaining to regulation for solvency.

(b) The board may prepare a report on the history and causes of any member insurer insolvency in which the association was obligated to pay covered claims, based on the information available to the association, and submit that report along with any recommendations resulting therefrom to the commissioner.

### § 1063.4. Cooperation; assignment of claims

(a) Insureds entitled to the protection of this article shall cooperate with the association in accordance with their policies in the same manner as they would have been required to cooperate with their insurer if it were not in liquidation and shall be deemed to have assigned to the association any right to make claim against the liquidator for a refund of unearned premium for the period of coverage provided by the association beginning on the date of the order of liquidation to the date of expiration or cancellation.

(b) Any insured or claimant entitled to the benefits of this article who elects to proceed under this article shall be deemed to have assigned to the association his or her rights against the estate of the insolvent insurer.

### § 1063.5. Insolvency; premiums; categories of claim payments; charges or credits; net direct written premiums; failure to pay premiums; interest

Each time an insurer becomes insolvent then, to the extent necessary to secure funds for the association for payment of covered claims of that insolvent insurer and also for payment of reasonable costs of adjusting the claims, the association shall collect premium payments from its member insurers sufficient to discharge its obligations. The association shall allocate its claim payments

and costs, incurred or estimated to be incurred, to one or more of the following categories: (a) workers' compensation claims; (b) homeowners' claims, and automobile claims, which shall include: automobile material damage, automobile liability (both personal injury and death and property damage), medical payments and uninsured motorist claims; and (c) claims other than workers' compensation, homeowners', and automobile, as above defined. Separate premium payments shall be required for each category. The premium payments for each category shall be used to pay the claims and costs allocated to that category. The rate of premium charged shall be a uniform percentage of net direct written premium in the preceding calendar year applicable to that category. The rate of premium charges to each member in the appropriate categories shall initially be based on the written premium of each insurer as shown in the latest year's annual financial statement on file with the commissioner. The initial premium shall be adjusted by applying the same rate of premium charge as initially used to each insurer's written premium as shown on the annual statement for the second year following the year in which the initial premium charge is made. The difference between the initial premium charge and the adjusted premium charge shall be charged or credited to each member insurer by the association as soon as practical after the filing of the annual statements of the member insurers with the commissioner for the year on which the adjusted premium is based. In the case of an insurer that was a member insurer when the initial premium charge was made and that paid the initial assessment but is no longer a member insurer at the time of the adjusted premium charge by reason of its insolvency or its withdrawal from the state and surrender of its certificate of authority to transact insurance in this state, any credit accruing to that insurer shall be refunded to it by the association. "Net direct written premiums" shall mean the amount of gross premi-



ums, less return premiums, received in that calendar year upon business done in this state, other than premiums received for reinsurance. In cases of a dispute as to the amount of any such net direct written premium between the association and one of its members the written decision of the commissioner shall be final. The premium charged to any member insurer for any of the three categories or a category established by the association shall not be more than 1 percent of the net direct premium written in that category in this state by that member insurer. The association may exempt or defer, in whole or in part, the premium charge of any member insurer, if the premium charge would cause the member insurer's financial statement to reflect an amount of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance. However, during the period of deferment, no dividends shall be paid to shareholders or policyholders by the company whose premium charge was deferred. Deferred premium charges shall be paid when the payment will not reduce capital or surplus below required minimums. These payments shall be credited against future premium charges to those companies receiving larger premium charges by virtue of the deferment. After all covered claims of the insolvent insurer and expenses of administration have been paid, any unused premiums and any reimbursements or claims dividends from the liquidator remaining in any category shall be retained by the association and applied to reduce future premium charges in the appropriate category. However, an insurer which ceases to be a member of the association, other than an insurer that has become insolvent or has withdrawn from the state and has surrendered its certificate of authority following an initial assessment that is entitled to a refund based upon an adjusted assessment as provided above in this section, shall have no right to a refund of any premium previously

remitted to the association. The commissioner may suspend or revoke the certificate of authority to transact business in this state of a member insurer which fails to pay a premium when due and after demand has been made.

Interest at a rate equal to the current federal reserve discount rate plus 2½ percent per annum shall be added to the premium of any member insurer which fails to submit the premium requested by the association within 30 days after such mailing request. However, in no event shall the interest rate exceed the legal maximum.

### § 1063.6. Stay of proceedings against insolvent insurer

Upon petition of the commissioner or the association, the superior court having jurisdiction of an insurer insolvency proceeding or, in the absence thereof, the superior court of the county wherein is located the principal office in this state may stay all proceedings in any court of law of this state to which the insolvent insurer is a party for a period of 60 days from the date a liquidator is appointed in this state or in the state of domicile of the insurer, to permit proper defense of all pending causes of action. Such stay shall be superseded by and when any stay order is entered in the court in this state having jurisdiction of the liquidation or the ancillary liquidation.

### § 1063.7. Liquidators; notice

When a liquidator, domiciliary or ancillary, is appointed in this state for any member insurer, the liquidator shall promptly give notice of his or her appointment and a brief description of the contents of this article and of the nature and functions of the association by prepaid first-class mail, to: (a) all persons known or reasonably expected to have or be interested in claims against the insurer, at the last known address within this state; (b) all insureds of the insurer, at the last known address within this state, accompanied by a notice of the date of



termination of insurance; and (c) the board of governors of the association. Such notice may, but need not be, combined with the notice provided for in Section 1021. In the situations where notice is being provided by an ancillary liquidator, notice is only required to the extent information is available to provide the notice. The ancillary liquidator may also rely on the notice provided by the domiciliary liquidator to satisfy the notice requirements of this section. The liquidator may also require that producers of record of the insurer give prompt written notice of the same information, by first-class mail, to their insureds at the last known address within this state. The liquidator shall also promptly publish such notice in a newspaper of general circulation in the county where the insurer had its principal office in this state not less than once per week, for four weeks, and by publication elsewhere in this state as the court shall direct.

### § 1063.8. Exemptions

Notwithstanding any other provision of law, the association shall be exempt from all license fees, income, franchise, privilege, property, or occupation taxes levied or assessed by this state, any municipality, county, or other political subdivision of this state. The rules of the commissioner promulgated pursuant to this article may exempt the association from: filing an annual statement, maintaining minimum required capital, paying any fees or reimbursements, or meeting any other requirement or doing any other thing required by this code or other laws relating to insurance.

### § 1063.9. Regulation

(a) The operation of the association shall at all times be subject to the regulation of the commissioner. The commissioner, or any deputy or examiner, or any person whom the commissioner shall appoint, shall have the power of visitation and examination into the affairs of

the association and free access to all books, papers, and documents that relate to the business of the association, may summon and qualify witnesses under oath, and may examine officers, agents or employees, or any other person having knowledge of the affairs, transactions, or conditions of the association.

(b) Any member insurer aggrieved by any action or decision of the association may appeal to the commissioner within 30 days after the action or decision of the association and after exhaustion of administrative remedies may seek court relief as provided in Section 12940.

### § 1063.10. Judicial review

All orders or decisions of the commissioner made pursuant to Chapter 1347, Statutes of 1969 (of which this article is a part) and the provisions thereof as amended from time to time, shall be subject to judicial review as provided in Section 12940.

### § 1063.11. Rules, regulations and orders

The commissioner may, upon notice and opportunity for all interested parties to be heard, issue such rules, regulations and orders as may be necessary to carry out the provisions of this article. Such rules and regulations shall be adopted, amended or repealed in accordance with Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2 of the Government Code.

### § 1063.12. Liability limits; indemnification against costs and expenses; proration of costs and expenses; application of section

(a) The association, its member insurers, and its officers, directors, agents or employees of the association, or its member insurers, shall under no circumstances be liable for any sum in excess of the amount of covered claims of the insolvent insurer, as defined under subdivision (c) of Section 1063.1 of this article and the



costs of administration and the costs of loss adjustment, investigation and defenses relating to claims thereunder.

(b) Any person or member made a party to any action, suit or proceeding because such person or member served on the board of governors or on a committee or was an officer or employee of the association shall be held harmless and be indemnified by the association against all liability and costs (including the amounts of judgments, settlements, fines or penalties) and expenses incurred in connection with such action, suit or proceeding; provided, however, such indemnification shall not be provided on any matter in which the person or member shall be finally adjudged in any such action, suit or proceeding to have committed a breach of duty involving gross negligence, dishonesty, willful misfeasance or reckless disregard of the responsibilities of his office.

(c) The costs and expenses of such indemnification shall be prorated and paid for by the members in the same manner as provided in the plan of operations for the proration of premiums.

(d) The provisions of this section shall not be construed as creating any right in any third person, and shall be applicable only as between the association and its member insurers and its officers, directors, agents, or employees of the association or its member insurers.

### § 1063.13. Members prohibited from engaging in unlawful trade practice

No member insurer of the association shall engage in the unlawful trade practice defined and condemned in subdivision (g) of Section 790.03.

### § 1063.14. Plan of operation; recoupment of assessments by surcharge on premiums

(a) The plan of operation adopted pursuant to subdivision (c) of Section 1063 shall contain provisions

whereby each member insurer is required to recoup over a reasonable length of time a sum reasonably calculated to recoup the assessments paid by the member insurer under this article by way of a surcharge on premiums charged for insurance policies to which this article applies. Amounts recouped shall not be considered premiums for any other purpose, including the computation of gross premium tax or agents' commission.

(b) The amount of any surcharge shall be separately stated on either a billing or policy declaration sent to an insured. The association shall determine the rate of the surcharge and the collection period for each category and these shall be mandatory for all member insurers of the association who write business in those categories. Member insurers who collect surcharges in excess of premiums paid pursuant to Section 1063.5 for an insolvent insurer shall remit the excess to the association as an additional premium within 30 days after the association has determined the amount of the excess recoupment and given notice to the member of that amount. The excess shall be applied to reduce future premium charges in the appropriate category.

(c) The plan of operation may permit a member insurer to omit collection of the surcharge from its insureds when the expense of collecting the surcharge would exceed the amount of the surcharge. However, nothing in this section shall relieve the member insurer of its obligation to recoup the amount of surcharge otherwise collectible.

### § 1063.145. Surcharge statement; association description and purpose

The statement of the amount of surcharge required to be provided under subdivision (b) of Section 1063.14 shall include a description of, and purpose for, the California Insurance Guarantee Association, as follows:



Companies writing property and casualty insurance business in California are required to participate in the California Insurance Guarantee Association. If a company becomes insolvent the California Insuratnce Guarantee Association settles unpaid claims and assesses each insurance company for its fair share.

California law requires all companies to surcharge policies to recover these assessments. If your policy is surcharged, "CA Surcharge" with an amount will be displayed on your premium notice." [1]

### § 1063.15. Workers' compensation matters; time periods applicable to association

In any workers' compensation matter the association shall have the same period of time within which to act or to exercise a right as is accorded to the insurer by the Labor Code, and those time periods shall be tolled against the association until 45 days after the appointment of a domiciliary or receiver.

### § 1064.1. Definitions

For the purposes of this act:

(a) "Insurer" means any person subject to the insurance supervisory authority of, or to liquidation, rehabilitation, reorganization, or conservation by the commissioner or the equivalent insurance supervisory official of another state.

(b) "Delinquency proceeding" means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving that insurer.

(c) "Foreign country" means territory not in any state.

(d) "Domiciliary state" means the state in which an insurer is incorporated or organized, or, in the case of an insurer incorporated or organized in a foreign coun-

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[1] So in chaptered copy.

try, the state in which the insurer, having become authorized to do business in the state, has, at the commencement of delinquency proceedings, the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders or policyholders and creditors in the United States; and any such insurer is deemed to be domiciled in such state.

(e) "Ancillary state" means any state other than a domiciliary state.

(f) "Reciprocal state" means any state other than this state in which in substance and effect the provisions of this act are in force, including the provisions requiring that the commissioner or equivalent insurance supervisory official be the receiver of a delinquent insurer. A "reciprocal state" includes any state also which has, through its commissioner or equivalent supervisory official, entered into a binding and enforceable written agreement with the commissioner of this state which provides that (1) a commissioner or equivalent supervisory official is required to be the receiver of a delinquent insurer; (2) title to assets of the delinquent insurer shall vest in the domiciliary receiver, as of the date of any court order appointing him or her as receiver, and he or she shall have the same rights to recover those assets as provided under subdivision (b) of Section 1064.3; (3) nondomiciliary creditors may file and prove their claims before ancillary receivers; (4) the laws of the domiciliary state of the delinquent insurer shall be applied uniformly to residents and nonresidents in the allowance of preference of claims, except for claims to special deposits created under the laws of the domiciliary state; (5) preferences (including attachments, garnishments, and liens) for creditors with advance information shall be prevented; and (6) the domiciliary receiver may sue in the reciprocal state to recover any assets of a delinquent insurer to which he or she may be entitled under the law.



(g) "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited, or otherwise encumbered for the security or benefit of specified persons or limited class or classes of persons, and as to such specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders or all policyholders and creditors in the United States, shall be deemed general assets.

(h) "Preferred claim" means any claim with respect to which the law of a state accords priority of payment from the general assets of the insurer.

(i) "Special deposit claim" means any claim secured by a deposit made for the security or benefit of a limited class or classes of persons, but not including any general assets.

(j) "Secured claim" means any claim secured by mortgage, trust, deed, pledge, deposit as security, escrow, or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims, which more than four months prior to the commencement of delinquency proceedings in the state of the insurer's domicile, have become liens upon specific assets by reason of judicial process.

(k) "Receiver" means receiver, liquidator, rehabilitator, or conservator as the context may require.

**§ 1064.2. Conduct of delinquency proceedings against insurers domiciled in this state**

(a) Whenever under the laws of this state a receiver is to be appointed in delinquency proceedings for an insurer domiciled in this state, the court shall appoint the commissioner as receiver. Upon the appointment, the court shall direct the receiver forthwith to take possession

of the assets of the insurer and to administer them under the orders of the court.

(b) The domiciliary receiver and his or her successors in office shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer wherever located, as of the date of the order of his or her appointment, and he or she shall have the right to recover the same and reduce them to possession; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are prescribed in this article for ancillary receivers appointed in this state as to assets located in this state. The filing or recording of the order appointing the receiver or certified copy thereof, in the office where instruments affecting title to property are required to be filed or recorded shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded. The domiciliary receiver shall be responsible on his or her official bond for the proper administration of all assets coming into his or her possession or control.

(c) Upon taking possession of the assets of a delinquent insurer the domiciliary receiver shall, subject to the direction of the court, and in accordance with such procedures as the receiver may petition the court to establish, immediately proceed to conduct the business of the insurer or to take such steps as are authorized by the laws of this state for the purpose of liquidating, rehabilitating, reorganizing, or conserving the affairs of the insurer. In connection with delinquency proceedings, he or she may appoint one or more special deputy commissioners to act for him or her, and may employ such counsel, clerks, and assistants as he or she deems necessary. The compensation of the special deputies, counsel, clerks, or assistants and all expenses of taking possession of the delinquent insurer and of conducting the delinquency



proceedings shall be fixed by the receiver, subject to the approval of the court, and shall be paid out of the funds or assets of the insurer. Within the limits of the duties imposed upon them, special deputies shall possess all the powers given to, and, in the exercise of those powers, shall be subject to all of the duties imposed upon the receiver with respect to delinquency proceedings.

### § 1064.3. Conduct of delinquency proceedings against insurers not domiciled in this state

(a) Whenever under the laws of this state an ancillary receiver is to be appointed in delinquency proceedings for an insurer not domiciled in this state, the court shall appoint the commissioner as ancillary receiver. The commissioner shall file an application requesting the appointment (1) if he or she finds that there are sufficient assets of that insurer located in this state, or that there are sufficient persons residing in this state having claims against that insurer, to justify the appointment of an ancillary receiver, or (2) if 10 or more persons resident in this state having claims against the insurer file an application with the commissioner requesting the appointment of an ancillary receiver.

(b) The domiciliary receiver of an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all of the books and records of the insurer located in this state, and he or she shall have the immediate right to recover balances due from local agents and to obtain possession of any books and records of the insurer found in this state. He or she shall also be entitled to recover the other assets of the insurer located in this state except that upon the appointment of an ancillary receiver in this state, the ancillary receiver shall, during the ancillary receivership proceedings, have the sole right to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those

special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this state, and shall pay the necessary expenses of the proceedings. All remaining assets shall be promptly transferred to the domiciliary receiver. Subject to the foregoing provisions, the ancillary receiver and his or her deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets, as a receiver of an insurer domiciled in this state.

(c) Notwithstanding any other provision of this article, in any ancillary receivership proceeding in this state against an insurer domiciled in a reciprocal state, assets located in this state which comprise all or part of any deposit by that insurer under the laws of that reciprocal state for the benefit and security of beneficiaries of awards of workers' compensation against insurers shall be returned promptly to the domiciliary receiver, if he or she so requests, without deduction of any amounts to satisfy claims of policyholders and creditors.

### § 1064.4. Filing and proving of claims of nonresidents against delinquent insurers domiciled in this state

(a) In a delinquency proceeding begun in this state against an insured domiciled in this state, claimants residing in reciprocal states may file claims either with the ancillary receivers, if any in their respective states, or with the domiciliary receiver. All claims shall be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(b) Controverted claims belonging to claimants residing in reciprocal states may either (1) be proved in this state as provided by law, or (2), if ancillary proceedings have been commenced in those reciprocal states, be proved in those proceedings. In the event a claimant elects to prove his or her claim in ancillary proceedings, if notice



of the claim and opportunity to appear and be heard is afforded the domiciliary receiver of this state as provided in Section 1064.5 with respect to ancillary proceedings in this state, the final allowance of such claim by the courts in the ancillary state shall be accepted in this state as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within the ancillary state.

### § 1064.5. Filing and proving of claims of residents against delinquent insurers domiciled in reciprocal states

(a) In a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants against such insurer who reside within this state may file claims either with the ancillary receiver, if any, appointed in this state, or with the domiciliary receiver. All such claims shall be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceeding.

(b) Controverted claims belonging to claimants residing in this state may either (1) be proved in the domiciliary state as provided by the laws of that state, or (2), if ancillary proceedings have been commenced in this state, be proved in those proceedings. In the event that any such claimant elects to prove his or her claim in this state, he or she shall file his or her claim with the ancillary receiver in the manner provided by the law of this state for the proving of claims against insurers domiciled in this state, and he or she shall give notice in writing to the receiver in the domiciliary state, either by registered mail or by personal service at least 40 days prior to the date set for hearing. The notice shall contain a concise statement of the amount of the claim, the facts on which the claim is based, and the priorities asserted, if any. If the domiciliary receiver, within 30 days after the giving of notice, shall give notice in writing to the ancillary receiver and to the

claimant, either by registered mail or by personal service, of his or her intention to contest that claim, he or she shall be entitled to appear or to be represented in any proceeding in this state involving the adjudication of the claim. The final allowance of the claim by the courts of this state shall be accepted as conclusive as to its amount, and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within this state.

### § 1064.6. Priority of preferred claims

(a) In a delinquency proceeding against an insurer domiciled in this state, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of this state. All such claims, whether owing to residents or nonresidents, shall be given equal priority of payment from general assets regardless of where such assets are located.

(b) In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to residents of this state shall be preferred if like claims are preferred by the laws of that state.

### § 1064.7. Priority of special deposit claims

The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provision governing the creation and maintenance of such deposits. If there is a deficiency in any such deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the general assets, but, unless applicable law provides otherwise, the sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective special deposits, have been paid percentages of their



claims equal to the percentage paid from the special deposit.

### § 1064.8. Priority of secured claims

The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his or her security and file his or her claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this article, or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, that amount shall be conclusive; otherwise the amount shall be determined in the delinquency proceeding in the domiciliary state.

### § 1064.9. Attachment and garnishment of assets

During the pendency of delinquency proceedings in this this or any reciprocal state, no action or proceeding in the nature of an attachment, garnishment, or execution shall be commenced or maintained in the courts of this state against the delinquent insurer or its assets. Any lien obtained by any such action or proceeding within four months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding.

### § 1064.10. Right of domiciliary receiver to sue in this state

The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this state to recover any assets of that insurer to which he or she may be entitled under the laws of this state.

### § 1064.11. Severability

If any provision of this article or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

### § 1064.12. Short title; uniformity of interpretation; application of § 1010 et seq.

(a) This article may be referred to as the "Uniform Insurers Rehabilitation Act."

(b) The Uniform Insurers Rehabilitation Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. To the extent that its provisions, when applicable, conflict with Article 14 (commencing with Section 1010), the provisions of this article shall control. The provisions of Article 14 (commencing with section 1010) not in conflict with this article shall be unaffected by it.

(c) This article does not apply in regard to insurers domiciled in any state that is not a reciprocal state, and to any insurer domiciled in a reciprocal state before that state appoints a domiciliary receiver for the insurer. All those insurers shall be governed by Article 14 (commencing with Section 1010). If a domiciliary receiver is appointed in a reciprocal state while a receivership is proceeding under Article 14 (commencing with Section 1010), the receiver under that article shall thereafter act as ancillary receiver under Section 1064.3.

The pertinent provisions of the Judiciary Act, codified as 28 U.S.C. §§ 1332(a), 1441(a), (c), provide as follows:



### § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

* * * *

### § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

* * * *

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

* * * *

**APPENDIX E**

[Filed Oct. 31, 1985]

SUPERIOR COURT OF
THE STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

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No. C572724

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
*Applicant,*

v.

MISSION INSURANCE COMPANY,
a California corporation,
*Respondent.*

---

ORDER APPOINTING CONSERVATOR AND RESTRAINING ORDER

The verified Application of the Insurance Commissioner of the State of California, having been filed herein and it appearing to the Court from said Application that Respondent herein is in such condition that it is insolvent within the meaning of the Insurance Code and that its further transaction of business will be hazardous to its policyholders, its creditors, and to the public,

IT IS HEREBY ORDERED:

1. That the Insurance Commissioner of the State of California, Applicant herein, is hereby appointed Conservator of Mission Insurance Company, Respondent herein, and is directed as such Conservator to conduct the business of Respondent or so much therof as to the Applicant may seem appropriate; and Applicant is authorized



as such Conservator in his discretion to pay or defer payment of all proper claims and of obligations against Respondent accruing prior to or subsequent to his appointment as Conservator;

2. That said Conservator forthwith take possession of all of Respondent's assets, books, records and property, both real and personal, wheresoever situated;

3. That there is hereby vested in said Conservator and his successors in office title to all of the property and assets of said Respondent, and all persons are enjoined from interfering with said Conservator's possession and title thereto;

4. That said Respondent, its officers, directors, and agents and employees are hereby enjoined from transacting any of the business of Respondent, or from disposing of any of Respondent's property or assets until further order of this court;

5. That all persons are enjoined from instituting or maintaining any action at law or suit in equity including but not limited to matters in arbitration, against said Respondent or against said Conservator of said Respondent, and from attaching or executing upon or taking any legal proceeding against any of the property of Respondent, including proceeds payable under any reinsurance contracts, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this court obtained after reasonable notice to the Conservator;

6. That all officers, directors, agents and employees of Respondent deliver to the Conservator all assets, books, records, equipment and other property of Respondent;

7. That all funds in bank accounts, including Certificates of Deposit, in the name of Respondent in various banks in the State of California are hereby vested in the Conservator and subject to withdrawal upon his order only;

8. That any and all agents of Respondent and all brokers who have done business for Respondent make all remittances of funds collected by them or in their hands directly to the Applicant as Conservator;

9. That the Conservator is authorized to pay all reasonable costs of operating Respondent as Conservator out of the funds and assets of said Respondent;

10. That all persons having possession of any lists of policyholders of Respondent deliver all such lists to the Conservator; that all persons are enjoined from using any of such lists or any information contained therein without the consent of said Conservator;

11. That the Conservator is authorized to initiate such legal or equitable actions in this or other states as he may deem necessary to carry out his duties as Conservator of Respondent, Mission Insurance Company.

DATED: October 31, 1985

/s/ John L. Cole
JOHN L. COLE
Judge of the Superior Court



[Filed Feb. 24, 1987]

SUPERIOR COURT OF
THE STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

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No. C572724

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
*Applicant,*

v.

MISSION INSURANCE COMPANY,
a California corporation,
*Respondent.*

---

ORDER APPOINTING LIQUIDATOR
AND RESTRAINING ORDER

The verified Application for Order of Liquidation of Respondent, Mission Insurance Company came on regularly for hearing on February 24, 1987, in Department 86 at 9:00 a.m., the Honorable Ricardo Torres, judge presiding. Applicant appeared by his counsel, John K. Van De Kamp, Attorney General of the State of California, by Raymond Jue, Deputy Attorney General, there was no other appearance.

IT IS HEREBY ORDERED THAT:

1. The Insurance Commissioner of the State of California is appointed in his official capacity as Liquidator of Respondent, Mission Insurance Company and directed to liquidate and wind up the affairs of Respondent in California and to act in all ways and exercise all powers necessary for the purpose of carrying out this order;

2. Title to all assets of Respondent now in the possession of the Insurance Commissioner as Conservator hereof, as well as title to any assets of said Respondent discovered hereafter is hereby vested in said liquidator;

3. Said Liquidator, as such, is hereby authorized to pay as expenses of administration, all expenses heretofore incurred by the conservator of Respondent and presently unpaid and is hereby authorized to pay the full amount of any checks or drafts which have been issued by the conservator of Respondent and which are presently outstanding and unpaid, when said checks or drafts are presented for payment;

4. The rights and liabilities of creditors, policyholders, shareholders, and all other persons interested in the assets of Respondent, including the State of California, are fixed as of the date of entry of this order;

5. Respondent and its officers, directors, agents and employees and all other persons are hereby enjoined and restrained from transacting any of the business of Respondent in California or the disposition of any of its assets or property;

6. All persons are hereby enjoined and restrained from interfering with the possession, title and rights of Applicant as liquidator, in and to the assets of Respondent, and from interference with the conduct of the liquidation in the winding up of the business of Respondent;

7. All persons are hereby enjoined from the waste of assets of Respondent;

8. All persons are hereby enjoined from instituting or prosecuting any action or proceedings against Respondent, or Applicant as Liquidator of Respondent, without the consent of this court obtained after reasonable notice to said Liquidator;

9. All persons are hereby enjoined from obtaining preferences, judgments, attachments or other liens, or



making any levy against Respondent or its assets without the consent of this court obtained after reasonable notice to said Liquidator;

10. All officers, directors, agents and employees of Respondent are hereby ordered to deliver to said Liquidator all assets, books, records, equipment and other property of said Respondent;

11. All funds and bank accounts in the name of Respondent, or Applicant as Conservator, are hereby vested in said Liquidator and said funds shall be subject to withdrawal from said banks upon the order of said Liquidator only;

12. All insurance agents and brokers are hereby ordered to account to the Liquidator of Respondent for all funds of Respondent held by them in their fiduciary capacity, as specified in Sections 1733, 1734 and 1735 of the Insurance Code, or due to Respondent, and directed to forward said funds to Applicant as Liquidator, and said funds are vested in Applicant as Liquidator; and

13. Said Liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this or other states as may appear to him necessary to carry out his function as Liquidator.

DATED: February 29, 1987.

/s/ Ricardo Torres
RICARDO TORRES
Judge of the Superior Court

[Filed Mar. 5, 1987]

SUPERIOR COURT OF
THE STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

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Case No.: C 572 724

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
*Applicant,*

v.

MISSION INSURANCE COMPANY,
a California corporation,
*Respondent.*

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Case No.: C 576 416

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
*Applicant,*

v.

MISSION REINSURANCE CORPORATION,
a Missouri corporation,
*Respondent.*

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Case No.: C 576 324

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
*Applicant,*

v.

MISSION NATIONAL INSURANCE COMPANY,
a California corporation,
*Respondent.*

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Case No.: C 576 325

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
*Applicant,*

v.

ENTERPRISE INSURANCE COMPANY,
a California corporation,
*Respondent.*

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Case No.: C 576 323

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,
*Applicant,*

v.

HOLLAND-AMERICA INSURANCE COMPANY,
a Missouri Corporation,
*Respondent.*

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## SUPPLEMENTAL ORDER REGARDING ORDER APPOINTING LIQUIDATOR AND RESTRAINING ORDER

The Receiver's Motion for Supplemental Order Regarding Order Appointing Liquidator and Restraining Order came on for consideration on March 5, 1987, in Department 86 at 1:30 p.m. The Receiver appeared by her counsel of record and there were no other appearances.

IT IS ORDERED THAT:

The Order Appointing Liquidator and Restraining Order entered in each of the above-captioned matters on February 24, 1987 (the "Liquidation Order") is hereby in all things reconfirmed and shall in all things remain in full force and effect;

It is hereby found and declared that the above-captioned companies (the "Respondent Companies") are and were

as of the entry of the Liquidation Order insolvent and that the Liquidation Order constitutes an order of insolvency and finding of insolvency with respect to each of the Respondent Companies;

There is hereby vested in the Liquidator herein and her successors in office exclusive and sole title to all of the property and assets of each of the Respondent Companies, of any kind or nature wherever situated, and all persons and other legal entities are enjoined from asserting dominion and control over same and from interfering with the said Liquidator's dominion, control, possession or title thereto; provided further, however, that with respect to Mission Reinsurance Corporation and Holland-America Insurance Company, both of which are domiciled in the State of Missouri this injunction shall relate only to property of such companies located within the State of California;

Subject to the rights of the Domicillary Receiver, if any, of the said Missouri companies, all persons are enjoined from instituting or maintaining any action at law or suit in equity including, but not limited to matters in arbitration, against said Respondents or against said Liquidator of said Respondent companies or proceeding against any of the assets or property of Respondents, including interfering with the Liquidator, or the exclusive jurisdiction of this court as provided for above, except after an order from this court obtained on good cause shown after reasonable notice to the Liquidator.

Subject to the limitation above concerning the Missouri Domiciled Companies, this court hereby continues its assumption of sole exclusive and continuing jurisdiction over all assets and property of Respondents and hereby asserts and assumes sole and exclusive jurisdiction over same to the exclusion of all others and further continues to assert and assume sole and exclusive jurisdiction to administer the said assets and property of the Respondents



through the Liquidator, and to determine the validity or invalidity of any and all claims to or affecting such assets;

The Order Approving Appointment, Retention Agreement and Fee Agreement entered herein on or about October 8, 1987 relating to Karl L. Rubinstein is hereby reaffirmed with respect to the Liquidation proceedings affecting Respondents and Karl L. Rubinstein shall continue to serve as Special Deputy Insurance Commissioner herein pursuant to such Order.

The Order Approving Appointment and Fee Agreement entered herein on or about February 2, 1987 relating to William Price is hereby reaffirmed with respect to the Liquidation proceedings affecting Respondents and William Price shall continue to serve as Special Deputy Insurance Commissioner herein pursuant to such Order;

The said Special Deputies and any of their partners, associates, employees or others associated with them shall, in the performance of any of their duties herein, be deemed to be a public officer acting in their official capacity on behalf of the state, and shall have no personal liability for or arising out of their acts or omissions performed in good faith in connection with their services performed in connection with Respondents or these Liquidation proceedings.

A hearing is hereby set for 9:00 a.m. on the 6th day of April, 1987 in Department 86 at which time any and all persons or other legal entities desiring to object to, comment upon, present evidence or comments with respect to or in any other way deal with the Liquidator's said Motion or this Order must do so. Any such objections, comments or other matter relating to the subject matter hereof must be made at such hearing or the same shall irrevocably be deemed waived.

It is further ordered that twenty (20) days Notice of this Order and Hearing shall be given to the Shareholders

of the Respondents, to the California Insurance Guaranty Association and to such other persons or other legal entities, if any, who shall, as of the date hereof, have entered their Request for Notice herein. It is hereby determined and decreed that such notice is fair, reasonable and sufficient and that no other or further notice is necessary or required.

/s/ Ricardo A. Torres
Judge of the Superior Court

DATED: March 5, 1987



## APPENDIX F

**[Excerpt of Respondent Allstate's Opening Brief]**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 91-55855

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ROXANI GILLESPIE, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, in Her Capacity as Liquidator of MISSION INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, ENTERPRISE INSURANCE COMPANY, HOLLAND-AMERICA INSURANCE COMPANY and MISSION REINSURANCE CORPORATION,
*Plaintiff-Appellee,*

vs.

ALLSTATE INSURANCE COMPANY,
*Defendant-Appellant,*

and

INSURANCE COMPANY OF NORTH AMERICA,
*Defendant.*

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On Appeal From the United States District Court
For the Central District of California
No. CV-90-4713 WMB

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**OPENING BRIEF OF DEFENDANT-APPELLANT ALLSTATE INSURANCE COMPANY**

* * * *

As the pendency of these other suits in federal court demonstrates, the fact that this lawsuit will have an effect on the amount of money available for distribution to Mission's creditors does not approach the kind of "undue interference" with state administrative matters necessary to justify abstention under *Burford*. The *NOPSI* decision itself makes this clear. In formulating the *Burford* abstention doctrine, the Court held that under *Burford* "a federal court *sitting in equity* must decline to interfere with the proceedings or orders of state administrative agencies." 109 S. Ct. at 2514 (emphasis supplied). The reference to equitable actions was no accident; the same language appears elsewhere in the Supreme Court's opinion. *See id.* at 2513 (observing that abstention was ordered in the *Burford* case because "the exercise of *equitable* jurisdiction by comparatively unsophisticated Federal District Courts alongside state court review had repeatedly led to '[d]elay, misunderstanding of local law, and needless federal conflict with state policy' ") (emphasis supplied). While *NOPSI* may not expressly hold that *Burford* abstention applies only in cases arising in equity rather than at law, at a minimum the Court's language counsels that the "exceptional circumstances" supporting an order of abstention are all the more rare in actions, at law, for money damages. The Third Circuit so concluded in its very recent decision in *University of Maryland v. Peat Marwick Main & Co.*, rejecting *Burford* abstention on the ground, among others, that:

> Here, unlike *Burford* and the other Supreme Court cases involving *Burford* doctrine, the action was at law, not in equity, and sought money damages.

923 F.2d at 271.

The conclusion that *Burford* abstention obtains principally if not solely in equitable proceedings, and not in mere actions at law for money damages, is fully consistent with the Supreme Court's earlier decisions. The *Burford*



doctrine was developed in instances in which a federal court was asked to review a state court administrative decision, such as the decision to grant or deny a drilling permit in *Burford*.[17] *See also Alabama Public Service Com'n v. Southern Ry Co.*, 341 U.S. 341, 342, 71.S.Ct. 762, 764 (1951) (abstention proper in action seeking "to enjoin the members of the Alabama Public Service Commission and the Attorney General of Alabama . . . from enforcing laws of Alabama prohibiting discontinuance of certain railroad passenger service"). The possibility of interference with proceedings or orders of state administrative agencies is obviously much greater where the federal court is asked to review or enforce a state administrative order, or to grant injunctive relief in support of or against the order. The potential for some direct affront to the state's proceedings or policy is greatly diminished when the federal proceeding is merely one at law for the recovery of money damages.

In *Burford*, for instance, there was an impermissible danger of federal interference because the federal court was being asked to disapprove the Texas Railway Commission's administrative ruling approving a permit to drill four oil wells, where the state had developed "its own elaborate review system for dealing with the geological complexities of oil and gas fields." *Colorado River*, 424 U.S. at 815, 96 S.Ct. at 1245 (discussing *Burford*, 319 U.S. at 326, 63 S.Ct. at 1103). No such improper interference would have been presented if the Railway Com-

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[17] This type of review, in which a federal District Court is asked to invalidate or enjoin a state court administrative decision or proceeding, is an equitable proceeding rather than one at law. *See generally* D. Dobbs, *Handbook on the Law of Remedies*, § 2.1 at 28 (1973) (equity cases include those in which "some equitable remedy, usually of a coercive nature, is sought . . . [such as] an injunction . . . or specific performance of a contract").

mission had merely filed a civil damages action in federal court, as the receiver of an insolvent drilling company, to recover payments due from third parties—just as the Commissioner here seeks to recover reinsurance balances on Mission's behalf.

The present case amply demonstrates the absence of any basis for abstention in a typical civil damages action. In this suit at law for money damages, the state's interest in the outcome of the proceeding is no different from that of any other civil plaintiff: the Commissioner wants money from Allstate. The situation might be different if, for instance, Allstate were challenging the denial of authorization to write a certain kind of insurance in California, and the issue presented was whether the Commissioner had reasonably concluded that allowing Allstate to do so would flood the market, causing rates to drop and hence driving out smaller, independent insurers. Such a suit, of course, would be akin to the dispute in the *Burford* case, where the federal court's intervention threatened to overturn the state Railway Commission's attempt to maintain an intricate balance in the allocation of drilling rights.

* * * *



**[Excerpt of Respondent Allstate's Reply Brief]**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 91-55855
No. 91-55907

JOHN GARAMENDI, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, MISSION REINSURANCE CORPORATION TRUST, and HOLLAND-AMERICA INSURANCE COMPANY TRUST as successor to Roxani Gillespie, Insurance Commissioner of the State of California, in her capacity as liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Holland-America Insurance Company and Mission Reinsurance Corporation,
*Plaintiff-Appellee,*

vs.

ALLSTATE INSURANCE COMPANY and
INSURANCE COMPANY OF NORTH AMERICA,
*Defendants-Appellants.*

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On Appeal From the United States District Court
for the Central District of California

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REPLY BRIEF OF APPELLANTS ALLSTATE INSURANCE COMPANY AND INSURANCE COMPANY OF NORTH AMERICA

* * * *

* * * *

Defendants overstate the impact of *NOPSI*, the Commissioner argues, because that decision did not hold that the *Burford* abstention doctrine applies only to equity cases. (Commissioner's Brief, at pages 29-32.) This is a straw man argument, for defendants do not ask this Court to hold that *Burford* must be strictly confined to equity suits. Instead, defendants simply note that *Burford* has typically been applied—as the Supreme Court intimated in *NOPSI*—in equitable proceedings, in which matters of substantial public policy import are more likely to arise than in a civil damages case like this action. The Commissioner presents no meaningful argument to the contrary, other than to cite a not-for-publication decision by the District of New Jersey that briefly discusses the application of *Burford* to actions at law. *Commissioner of Insurance of the State of New Jersey v. Mid-American General Agency, Inc.*, No. 91-1380 (D.N.J. Oct. 21, 1991).[10]

* * * *

[10] Finally, the Commissioner argues that the District Court should not have stayed the action on the basis of *Burford* abstention. (Commissioner's Brief, at 33 *et seq.*). This argument misses the point. Defendants contend only that a stay would have been proper if the basis for abstaining, as it appears largely to have been, is the pendency before the California.